IN THE Supreme Court of the United States

ANTHONY BARRY and BRIAN CAHILL,

Petitioners

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent

Appendix to Petition for Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

Counsel of Record for Petitioner Barry

Counsel of Record for Petitioner Cahill

Rosemary Curran Scapicchio 107 Union Wharf Boston, Massachusetts 02109 (617) 263-7400 scapicchio_attorney@yahoo.com Claudia Leis Bolgen Bolgen & Bolgen 110 Winn Street, Suite 204 Woburn, MA 01801 (781) 938-5819 claudialb@bolgenlaw.com

Index to the Appendix

Opinion in Commonwealth v. Anthony Barry and Brian Cahill, 481 Mass. 388, 11 N.E.3d 554 (2019)	
Opinion of the Middlesex Superior Court dated September 13, 2016	20a
Opinion of the Middlesex Superior Court dated August 20, 2003	38a

481 Mass. 388 Supreme Judicial Court of Massachusetts, Middlesex..

COMMONWEALTH

v.

Anthony BARRY

(and nine companion cases ¹).

SJC-08635 | Argued October 5, 2018. | Decided February 12, 2019.

Synopsis

Background: Defendants were convicted in the Superior Court Department, Robert A. Barton, Elizabeth Butler, and Robert B. Gordon, JJ., of first-degree murder. Defendants appealed.

Holdings: The Supreme Judicial Court, Lowy, J., held that:

- [1] evidence was sufficient to support verdict that both defendants caused victim's death;
- [2] Commonwealth's nondisclosure of hospital records from visit that witness made to hospital approximately four days after shooting did not prejudice defendants and thus was not reversible error;
- [3] Commonwealth's failure to disclose police report of interview, in which an individual implicated a third party as shooter, did not prejudice defendants and thus did not constitute *Brady* violation;
- [4] police reports authored after trial, in which reports confidential informant indicated that defendants were not perpetrators of murder, did not cast doubt on defendants' convictions and thus did not support grant of new trial on basis of newly discovered evidence;
- [5] witness's post-trial affidavit recanting trial testimony which inculpated defendants was inconsequential to outcome of trial and thus did not support grant of new trial on basis of newly-discovered evidence; and

[6] Commonwealth properly invoked informant privilege to preclude disclosure of identity of confidential informant identified in police reports.

Affirmed.

West Headnotes (42)

[1] Criminal Law

Motion for new trial

Criminal Law

Mew Trial

Criminal Law

- Decisions on motion for new trial

On review of denial of motion for new trial, Supreme Judicial Court considers asserted errors in the motion to determine whether there has been a significant error of law or other abuse of discretion, and whether any such error creates a substantial likelihood of a miscarriage of justice. Mass. Gen. Laws Ann. ch. 278, § 33E.

Cases that cite this headnote

[2] Criminal Law

→ Nature of Decision Appealed from as Affecting Scope of Review

Criminal Law

Construction in favor of government, state, or prosecution

Criminal Law

← Inferences or deductions from evidence

Supreme Judicial Court reviews the denial of a motion for a required finding of not guilty to determine whether the evidence offered by the Commonwealth, together with reasonable inferences therefrom, when viewed in its light most favorable to the Commonwealth, was sufficient to persuade a rational jury beyond a reasonable doubt of the existence of every element of the crime charged.

Cases that cite this headnote

[3] Criminal Law

Experts •

Homicide

Cause of death

Evidence was sufficient to support verdict that both defendants caused victim's death, supporting first-degree murder convictions of two defendants in case arising out of incident in which defendants both fired gunshots into car in which victim sat; medical examiner determined that two separate gunshot wounds were each in and of themselves lethal, victim's cause of death was found to be "multiple gunshot wounds," and two gunshots incurred by victim were fired from two different weapons.

Cases that cite this headnote

[4] Homicide

Cause of death

In a homicide prosecution, there may be more than one proximate cause of a victim's death.

Cases that cite this headnote

[5] Homicide

Cause of death

The conduct of two or more persons is each a proximate cause of victim's death if the conduct concurrently contributes to the death; such a cause is concurrent if it was operative at the moment of death and acted with another cause to produce the death.

Cases that cite this headnote

[6] Criminal Law

Discovery and disclosure; transcripts of prior proceedings

Commonwealth's nondisclosure of hospital records from visit that witness made to hospital approximately four days after shooting did not prejudice defendants and thus was not reversible error in murder prosecution, despite argument that hospital visit involved heroin withdrawal and thus undermined witness's testimony that he was not influenced by drugs at time of shooting; evidence was cumulative of other evidence already before jury, and witness's drug use was well-established.

Cases that cite this headnote

[7] Criminal Law

← Materiality and probable effect of information in general

Criminal Law

Impeaching evidence

Evidence is exculpatory, as could be required to be disclosed by state, if it provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness.

Cases that cite this headnote

[8] Criminal Law

Misconduct of Counsel for Prosecution

To obtain a new trial on the basis of nondisclosed exculpatory evidence, a defendant must establish (1) that the evidence was in the possession, custody, or control of the prosecutor or a person subject to the prosecutor's control; (2) that the evidence is exculpatory; and (3) prejudice.

Cases that cite this headnote

[9] Criminal Law

Discovery and disclosure; transcripts of prior proceedings

Where no specific request for a particular piece of evidence is made, appellate court determines prejudice from nondisclosure using the same standard used to assess impact of newly discovered evidence, that is, whether

there is a substantial risk that the jury would have reached a different conclusion if the evidence had been admitted at trial.

Cases that cite this headnote

[10] Criminal Law

Impeachment of Witness

Newly discovered evidence that tends merely to impeach the credibility of a witness will not ordinarily be the basis of a new trial.

Cases that cite this headnote

[11] Criminal Law



Defendants' discovery motion seeking "[a]ny material relating to the witness' mental or physical history that tends to impair or reflect adversely on his reliability as a witness," or, as amended, "[a]ny material [that] would tend to affect the witness' motive to testify or ability to perceive, recall, or understand events," did not constitute a specific request for disclosure of witness's medical records.

Cases that cite this headnote

[12] Criminal Law

Hearing and rehearing in general

Trial court acted within its discretion in declining to hold evidentiary hearing on murder defendants' motion for new trial, where trial court found that briefs, supporting documents, and trial transcripts were sufficient to allow it to reach an informed decision. Mass. R. Crim. P. 30(c) (3).

Cases that cite this headnote

[13] Criminal Law

Hearing and rehearing in general

Although the motions and supporting materials filed by a defendant to support a motion for new trial need not prove the issue raised therein, they must at least contain sufficient credible information to cast doubt on the issue, in order to create a substantial

issue that would warrant evidentiary hearing. Mass. R. Crim. P. 30(c) (3).

Cases that cite this headnote

[14] Criminal Law

Hearing and rehearing in general

In determining whether a substantial issue exists, as would warrant evidentiary hearing on motion for new trial, a judge considers the seriousness of issues raised and adequacy of defendant's showing on those issues. Mass. R. Crim. P. 30(c) (3).

Cases that cite this headnote

[15] Criminal Law

Hearing and rehearing in general

Criminal Law

New Trial

Whether to hold an evidentiary hearing on a motion for new trial is a decision squarely within the judge's discretion, and Supreme Judicial Court reviews the decision for an abuse of discretion. Mass. R. Crim. P. 30(c) (3).

Cases that cite this headnote

[16] Criminal Law

Evidence incriminating others

Commonwealth's failure to disclose police report of interview, in which an individual implicated a third party as shooter, did not prejudice defendants and thus did not constitute *Brady* violation, in murder prosecution arising out of incident in which two defendants were charged with having shot victim, where report did not indicate basis for statement that one defendant could not have been the shooter, and individual who made statement later wrote an affidavit that undermined exculpatory nature of statement and led to an investigation which further inculpated defendants.

Cases that cite this headnote

[17] Criminal Law

Evidence incriminating others

Report from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), detailing an interview of witness in which witness purportedly stated that third party had motive to commit shooting, was not exculpatory and thus was not subject to disclosure under *Brady* in murder prosecution; report inculpated defendants by saying that they were the shooters, and any motive that could be gleaned from report would not be a significant enough aid to defense to be exculpatory.

Cases that cite this headnote

[18] Criminal Law

Newly Discovered Evidence

A defendant seeking a new trial on the ground of newly discovered evidence must establish both that the evidence is newly discovered and that it casts real doubt on the justice of the conviction.

Cases that cite this headnote

[19] Criminal Law

Materiality

Criminal Law

Credibility

To support grant of new trial, newly discovered evidence must be material and credible.

Cases that cite this headnote

[20] Criminal Law

Particular evidence or cases

Police reports authored after trial, in which reports confidential informant indicated that defendants were not perpetrators of murder, did not cast doubt on defendants' murder convictions and thus did not support grant of new trial on basis of newly discovered evidence, where informant's statement was based only on "word on the street" and unsubstantiated rumors.

Cases that cite this headnote

[21] Criminal Law

Cumulative Evidence

Criminal Law

← Probable effect of new evidence, in general

To support grant of new trial, newly discovered evidence must carry a measure of strength in support of defendant's position and will carry less weight if it is cumulative of evidence admitted at trial.

Cases that cite this headnote

[22] Criminal Law

Facts within knowledge of defendant

Affidavit of witness, indicating that other witness, contrary to trial testimony, did not implicate defendants immediately after shooting, did not constitute newly discovered evidence and thus did not support grant of new trial in murder prosecution, where defense counsel knew before trial that witness who wrote affidavit had said that other witness never implicated the defendants.

Cases that cite this headnote

[23] Criminal Law

Particular evidence or cases

Witness's post-trial affidavit recanting trial testimony which inculpated defendants was inconsequential to outcome of trial and thus did not support grant of new trial on basis of newly-discovered evidence, in murder prosecution arising out of incident in which two defendants shot at victim, where there was significant evidence pointing to the defendants as the shooters.

Cases that cite this headnote

[24] Criminal Law

Incriminating others

In order to be admitted, third-party culprit evidence must have a rational tendency to prove the issue the defense raises, and it cannot be too remote or speculative.

Cases that cite this headnote

[25] Homicide

Incriminating Others

Evidence that third party committed a different murder that had similar facts to instant murder was too remote or speculative to be admissible as third-party culprit evidence in instant murder prosecution, in which defendants disputed that they were the perpetrators of shooting, where similarity between cases was that a gun was left at murder scene.

Cases that cite this headnote

[26] Criminal Law

Affidavits and Other Proofs in General

Burden is on defendant to prove facts underlying motion for new trial.

Cases that cite this headnote

[27] Criminal Law

Course and conduct of trial in general

When a defendant fails to object to alleged violation of right to public trial, Supreme Judicial Court reviews any error for a substantial likelihood of miscarriage of justice.

Cases that cite this headnote

[28] Criminal Law

Right of Accused to Confront Witnesses

Expert who testified at murder trial about probability of random match of DNA sample to defendant's DNA profile was not a substitute expert and thus his testimony did not implicate confrontation clause, where expert participated in analysis of the samples and testified about a report detailing his

conclusions that he personally submitted to the prosecution. U.S. Const. Amend. 6.

Cases that cite this headnote

[29] Criminal Law

Cross-examination and redirect examination

The critical issue with respect to an expert, including in particular a DNA analyst, is whether the defendant is able to cross-examine the expert in a meaningful way regarding possible flaws relating to the underlying data that forms the basis of his or her opinion.

Cases that cite this headnote

[30] Criminal Law

← Identification of persons, things, or substances

There is no requirement that the person who physically tested DNA samples testify regarding DNA analysis.

Cases that cite this headnote

[31] Criminal Law

Sources of data

An expert can testify to his own opinions after interpreting data and reaching his own conclusions.

Cases that cite this headnote

[32] Criminal Law

Nature or stage of proceeding

The right to confrontation is a trial right and is inapplicable to pretrial discovery. U.S. Const. Amend. 6; Mass. Const. pt. 1, art. 12.

Cases that cite this headnote

[33] Criminal Law

Right of Accused to Confront Witnesses

Principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of

ex parte examinations as evidence against the accused. U.S. Const. Amend. 6.

Cases that cite this headnote

[34] Criminal Law

Right of Accused to Confront Witnesses

Criminal Law

Availability of declarant

A witness's testimony against a defendant is inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. U.S. Const. Amend. 6.

Cases that cite this headnote

[35] Criminal Law

← Informers or Agents, Disclosure

The informant privilege may be asserted where the Commonwealth otherwise would be required to provide an informant's identity to a defendant as part of its discovery obligations.

Cases that cite this headnote

[36] Criminal Law

• Informers or Agents, Disclosure

In determining whether an informant's identity was properly withheld pursuant to informant privilege, court determines: (a) whether the Commonwealth has properly asserted an informant privilege, and (b) whether the defendant has adequately challenged the assertion of the privilege as an impermissible interference with his or her right to present a defense.

Cases that cite this headnote

[37] Criminal Law

← Informers or Agents, Disclosure

Commonwealth may assert the informant privilege only where disclosure of informant's identity would endanger informant or otherwise impede law enforcement efforts.

Cases that cite this headnote

[38] Criminal Law

← Informers or Agents, Disclosure

If Commonwealth has properly asserted the informant privilege, defendant may request that privilege be set aside on the grounds that it interferes with a fair defense.

Cases that cite this headnote

[39] Criminal Law

Proceedings for Disclosure

In requesting that informant privilege be set aside, defendant must present some offering so that the trial judge may assess materiality and relevancy of the disclosure to the defense, but only if it is not apparent from nature of case and defense offered thereto.

Cases that cite this headnote

[40] Criminal Law

← Informers or Agents, Disclosure

If Commonwealth properly invoked informant privilege and defendant adequately challenged assertion of the privilege, court then balances public interest in protecting flow of information against defendant's right to prepare his defense; in doing so, court considers the crime charged, the possible defenses, the possible significance of privileged testimony, and other relevant factors.

Cases that cite this headnote

[41] Criminal Law

Particular Cases

Commonwealth properly invoked informant privilege to preclude disclosure of identity of confidential informant identified in police reports, who allegedly provided exculpatory information, in murder prosecution arising out of two defendants' shooting of victim; police had received reports that two individuals potentially connected to case were

seeking retribution against another witness who implicated them in the killing, and court had ordered deposition of another witness out of concern that the witness would be killed before testifying.

Cases that cite this headnote

[42] Criminal Law

Particular Cases

Defendants failed to adequately challenge Commonwealth's assertion of informant privilege to preclude disclosure of identity of confidential informant identified in police reports, who allegedly provided exculpatory information, in murder prosecution arising out of two defendants' shooting of victim; informant provided no details beyond a threadbare rumor to support his allegation that someone other than defendants committed murder, and informant was not a percipient witness and had not learned the information from a percipient witness.

Cases that cite this headnote

**559 Homicide. Proximate Cause. Evidence, Exculpatory, Police report, Disclosure of evidence. Deoxyribonucleic Acid. Constitutional Law, Fair trial, Confrontation of witnesses. Due Process of Law, Fair trial. Fair Trial. Practice, Criminal, Capital case, New trial, Discovery, Fair trial, Confrontation of witnesses, Disclosure of identity of informer.

INDICTMENTS found and returned in the Superior Court Department on July 23, 1999.

The cases were tried before Robert A. Barton, J.; a motion for a new trial, filed on May 17, 2002, was heard by Elizabeth Butler, J.; and a second motion for a new trial, filed on November 20, 2014, was heard by Robert B. Gordon, J.

Attorneys and Law Firms

Rosemary Curran Scapicchio, Boston (Jillise McDonough, Boston, also present) for Anthony Barry.

Claudia Leis Bolgen, Woburn, for Brian Cahill.

Casey E. Silvia, Assistant District Attorney (Timothy Ferriter, Assistant District Attorney, also present) for the Commonwealth.

Present: Gants, C.J., Gaziano, Lowy, & Budd, JJ.

Opinion

LOWY, J.

*389 Shortly after midnight on April 17, 1999, Kevin McCormack and Brian Porreca were part of a group leaving a bar in Malden with plans to continue their night at a club in Boston. They never made it. As the group prepared to leave, Porreca saw two longtime friends, Anthony Barry and Brian Cahill, run up to the vehicle that the group was entering. While Cahill stayed on the passenger side of the vehicle, shooting an Uzi at it, Barry fired a handgun into the back of McCormack's head as he sat in the *390 driver's seat. Porreca and one of the women in their group were also shot, and Porreca retreated into the bar. Based largely on Porreca's testimony, Barry and Cahill were convicted of murder in the first degree. ²

The defendants each filed two motions for a new trial, each of which was denied. Their direct appeal is consolidated with their appeal from the denial of those motions, and they argue that multiple reversible errors occurred both during and after trial. We consider whether (1) there was sufficient evidence to support each defendant's murder conviction; (2) the Commonwealth withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); (3) newly discovered evidence warranted a new trial; (4) expert testimony regarding deoxyribonucleic acid (DNA) violated the defendants' rights to confrontation and due process; (5) the defendants' right to a public trial was violated; (6) discovery violations implicated the confrontation clause; and (7) a motion for the disclosure of a confidential informant's identity was erroneously denied. We affirm.

Background. 1. The shooting. We recite facts that the jury could have found and that are necessary to resolve the defendants' appeal, reserving some facts for later discussion. Porreca met some friends, including McCormack, at a bar in Malden on the night of April 16, 1999. While there, **560 Porreca drank four or five

beers before he, McCormack, Lindsay Cremone, Kristen Terfry, Stephen Almeida, and John Whitson decided to go to a club in Boston. The group left the bar at 12:15 A.M. on April 17 and proceeded to Cremone's sister's car. McCormack sat in the driver's seat, Terfry sat in the front passenger seat, Cremone sat in the rear driver's side seat, and Porreca was preparing to enter the rear seat on the passenger's side ³ when he heard voices in the parking lot and looked up to see Barry and Cahill running in their direction. The men wore dark hoods that covered their ears, hair, and heads, but left their faces exposed. Cahill ran toward the passenger's side of the vehicle and fired a nine millimeter Uzi-type semiautomatic weapon into it, striking McCormack several times and shooting Porreca and Cremone twice each. Porreca had seen Barry running toward the driver's side of the car, and Cremone *391 testified that a man ran to the driver's side of the vehicle. put a gun to McCormack's head, and shot him.

After being shot, Porreca observed Cahill turning toward the vehicle and heard "a lot of gunshots" as he retreated into the bar. From the back seat, Cremone heard "two different types of firing." As Porreca entered the bar, he yelled "call 9-1-1" and approached Whitson, with whom the group had been socializing earlier. Porreca exclaimed, "Fuck'n Barry and Cahill" to Whitson, and approached Gene Giangrande's ⁴ girlfriend and told her to "[t]ell Gene I'm going to blow his fuck'n head off." Porreca explained that he said this because "[i]t was Gene Giangrande's crew, his friends who had just shot me, and I was mad at him."

A .40 caliber pistol was found on the ground next to the driver's side of the vehicle. The Uzi used in the attack was found by two teenagers walking home at approximately 2:30 A.M. on April 17 on the sidewalk of Whitman Street, close to the bar. One of the teenagers who found the Uzi took it home, unloaded it, and hid it in the basement of his house before turning it in to the Malden police the following day.

2. Porreca's background. Porreca grew up in Medford and was friends with each of the defendants. Porreca introduced the defendants to each other in 1994 or 1995, after which the defendants became "close." Porreca was also friends with Giangrande, an area bookmaker and drug dealer; William Angelesco, a friend of Giangrande's who was known to be connected with organized crime; and McCormack, the victim. Porreca was a former professional boxer and collected debts owed to

Giangrande, who would pay him in cash or with Percocet pills. Porreca had a lengthy criminal history. The jury also heard evidence of Porreca's substance abuse. He admitted to being addicted to opiates and having consumed two or three Percocet pills on the morning of the shooting.

At the time of the murder, Porreca was under Federal investigation for his involvement in the kidnapping of an area drug dealer that took place in 1995 (kidnapping). Allegedly, Porreca and another man, in an attempt to determine the location of a shipment of marijuana from Mexico, kidnapped the drug dealer and brought him to a house in Medford. The man was tied up, sprayed with lighter fluid, and questioned as Porreca held a gun *392 and another man held a lighter. After approximately **561 one hour, Porreca and the other man released the kidnapped party. In early April 1999, Porreca received a summons to appear before a Federal grand jury, and met with several members of law enforcement to discuss the likely charges against him. Porreca left that meeting believing that he was facing fifteen or more years in prison if he did not cooperate with law enforcement; and if he did, his likely sentence would be reduced to approximately five years.

3. Additional trial evidence. The jury also heard testimony of the police investigation into the shooting. Porreca was interviewed by police at the hospital and was initially uncooperative. He first said that "two white guys" whom he knew had conducted the shooting, but later stated that it was actually "two black guys." Eventually, Porreca told a State police trooper investigating the shooting that he would identify the shooters in exchange for a promise that he would not go to prison for his involvement in the kidnapping. Porreca received such an assurance from the United States Attorney's office, agreed to cooperate, and identified the defendants to the police.

Pursuant to search warrants, police searched Cahill's residence in Randolph and recovered an ammunition can with a sticker from an army-navy style surplus store in Malden with a large pair of Hatch-brand leather gloves. A search of Barry's apartment in Melrose also yielded two Nomex hoods ⁵ and an extra-large pair of Hatch gloves in a box with two bulletproof vests. The owner of the surplus store testified that two young men loosely matching the defendants' descriptions had purchased two pairs of Hatch gloves (one large and one extra-large), two Nomex hoods, and a can of .30 caliber ammunition one

week before the shooting. A DNA expert testified that a saliva sample found on one of the Nomex hoods found in Barry's apartment matched Cahill's DNA.

A medical examiner testified about the autopsy he performed on McCormack. Detailing McCormack's injuries, he first described the gunshot wound to McCormack's head and offered his opinion that that wound alone was lethal. He further testified about a separate, independently lethal gunshot wound to McCormack's back. The bullet removed from McCormack's head was a .40 caliber bullet that matched the pistol left on the scene, while the second lethal wound was caused by an undetermined, *393 but different, caliber bullet. One .40 caliber shell casing was recovered from the crime scene, found in the backseat of the car, and fourteen nine millimeter shell casings were found on the scene -- thirteen on or around the car and one on the floor of the car.

4. First motion for a new trial. In 2002, approximately two years after trial, the defendants filed their first motion for a new trial. After a three-day evidentiary hearing, the motion was denied. The primary arguments in the first motion centered on evidence discovered after trial that the defendants contended would have assisted their attack on Porreca's credibility. They also presented evidence that suggested that Giangrande and Angelesco had **562 admitted to others that they, rather than the defendants, were the shooters.

The defendants maintained that the Commonwealth intentionally withheld evidence that Porreca was brought by police to Saints Memorial Hospital in Lowell on April 21, 1999, four days after the shooting, where he complained that he was in heroin withdrawal. In those records, medical staff noted that Porreca stated to them to be "drug sick" and that one of the police officers accompanying him indicated that he had been vomiting for most of the previous night. At the evidentiary hearing, two doctors opined about Porreca's medical records. One of the doctors described the effects of opiate withdrawal and indicated that Porreca's behavior at the hospital was consistent with being in withdrawal, and that Porreca's actions immediately after the shooting were consistent with being intoxicated at the time. In contrast, the doctor who treated Porreca testified that, although he did not remember treating Porreca, he also did not document any symptoms of withdrawal. The treating doctor also testified that the records suggested that Porreca was not in withdrawal during the visit. The judge who heard the first motion for a new trial (first motion judge) credited the testimony of the doctor who had treated Porreca.

The defendants contended that the Commonwealth withheld these medical records in violation of Brady, 373 U.S. at 87, 83 S.Ct. 1194, which requires that the Commonwealth disclose to defendants all exculpatory evidence in its control. The first motion judge ultimately *394 held that, although the medical records were exculpatory and were in the Commonwealth's possession, the defendants were not prejudiced by the Commonwealth's failure to produce the records because they were cumulative of other evidence presented at trial and did not "carry a measure of strength in support of the defendant." Commonwealth v. Bregoli, 431 Mass. 265, 272, 727 N.E.2d 59 (2000), quoting Commonwealth v. Tucceri, 412 Mass. 401, 414, 589 N.E.2d 1216 (1992).

5. Second motion for a new trial. The defendants filed a second motion for a new trial in November 2014, raising several issues, including an argument that the Commonwealth withheld newly discovered pieces of exculpatory evidence. The motion was denied following a nonevidentiary hearing, the judge (second motion judge) having deemed an evidentiary hearing unnecessary because the defendants did not raise a serious question under Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001), and the briefs, transcripts, and supporting documents were sufficient to allow the second motion judge to make an informed decision.

The defendants maintained that police reports discovered after trial constituted Brady violations, and that six pieces of newly discovered evidence cast doubt on the convictions and warranted a new trial. As the defendants now assert error in the denial of this motion for each of these pieces of evidence, we briefly detail each piece in turn.

a. Orlando reports. The defendants discovered two reports authored after the trial by Sergeant Nunzio Orlando of the State police (Orlando reports), one dated July 17, 2001, and the other dated July 25, 2001. The July 17 report was heavily redacted and described information gleaned from a confidential informant, who stated in part that "Angelesco 'got straightened out' because he shot and killed 'Mucka' McCormack in Malden." The July

25 report **563 indicated that Angelesco had become a "made member" in the Boston mafia and that he had " 'earned his bones' by killing 'Mucka' McCormack." The informant also stated that "Anthony Barry was not the shooter in the McCormack murder. Barry was behind the scenes as far as orchestrating McCormack's assassination, but Angelesco and Cahill were the actual shooters. In addition, Gene Giangrande allegedly drove the getaway vehicle." The second motion judge analyzed these two reports under Brady *395 and determined that they were not possessed by the Commonwealth, were not exculpatory because they would not have been admissible at trial, and were not prejudicial because they would not have had an impact on the jury's conclusion.

b. Montana report. A report written by Sergeant David Montana of the Medford police department (Montana report) relayed a conversation he had with an individual who implicated a third party, Robert Rennell, as the shooter in McCormack's murder. This individual further stated that "there was no way that Anthony Barry" was the shooter, and that Porreca had contacted him indicating that he was willing to alter his testimony in exchange for \$ 100,000. The second motion judge concluded that the Montana report had not been possessed by the prosecution, was inculpatory despite appearing exculpatory on its face because of the fruits of subsequent police investigation, and was not prejudicial because it was unlikely to have had an impact on the jury's conclusion.

c. Bureau of Alcohol, Tobacco, Firearms and Explosives report. The final asserted Brady violation raised in the second motion for a new trial concerned an unredacted version of a report from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF report) detailing an interview of Porreca conducted on April 21, 1999. In the redacted version of the report, which the defense possessed at the time of trial, Porreca stated that he had spoken to a friend of McCormack, Johnnie Decologero, at the bar on the night of the shooting and that Barry did not get along with Decologero's brother, Paul. The unredacted version indicated, among other things, that Paul Decologero had initiated the 1995 kidnapping for which Porreca was under Federal investigation in 1999.

The second motion judge determined that neither version of the ATF report was exculpatory, particularly because even the redacted version named the defendants as the shooters. He further concluded that the defendants had not established that the unredacted version of the report, created by a Federal agency, was ever in the possession of the Commonwealth. Finally, the judge determined that the defendants did not establish that they were prejudiced by not possessing the unredacted ATF report.

d. Newly discovered evidence. The second motion judge also considered the defendants' argument that six pieces of newly discovered evidence would have had an impact on the jury's verdicts. Those pieces of evidence include a third report authored by *396 Orlando on July 26, 2001, 9 additional evidence of Porreca's drug use, an affidavit from Whitson, an affidavit from Brittany Cahill, evidence that Angelesco had committed a different murder, and evidence that police intimidated potential witnesses prior to the hearing on the first motion for **564 a new trial. The motion was denied, and the judge reached the following conclusions: (1) the absence of the July 26 Orlando report did not undermine the denial of the first motion for a new trial; (2) the evidence regarding Porreca's drug use was cumulative, not newly discovered, and insufficient to warrant a new trial as it went merely to credibility; (3) Whitson's affidavit, which contradicted Porreca's testimony that he had cursed Barry's and Cahill's names to Whitson after retreating into the bar following the shooting, was reasonably discoverable at the time of trial and cumulative of other testimony undercutting Porreca's recollection; (4) Brittany Cahill's affidavit, in which she recanted portions of her testimony against her brother, was inconsequential to the jury's verdicts; (5) evidence that Angelesco was indicted for and acquitted of a different murder with loose factual similarities to McCormack's death would not have been admissible at the defendants' trial as evidence of a thirdparty culprit; and (6) the defendants' argument that law enforcement targeted potential witnesses with search and arrest warrants to discourage them from testifying at the hearing on the first motion for a new trial was meritless because the actions of the police were the result of a long investigation.

e. DNA expert. The defendants' second motion for a new trial also challenged the DNA testimony at trial, asserting that their constitutional right to confrontation had been violated because the DNA expert had not conducted the testing. The second motion judge determined that the expert, who was the director of the laboratory where the DNA was analyzed, discussed his laboratory's procedures

and then opined that the DNA found in saliva on the Nomex hood was a near certain match to Cahill's DNA. The judge held that, because the expert was referring to his own conclusions based on a report that he was involved in creating, he was not a substitute expert and the defendants' right to confrontation *397 was not implicated. The judge further concluded that the defendants' challenge to the reliability of the DNA testing itself, which was based on testing of only eight DNA loci, was unfounded. The judge noted the expert's testimony that using eight loci was an accepted method in the scientific community and observed that the defendants failed to establish that the method was unreliable.

f. Court room closure. The defendants asserted that the trial judge's practice of conducting a hardship inquiry of jurors outside the presence of the defendants and their counsel, as well as the exclusion of members of the defendants' families during jury selection, constituted constitutional violations warranting a new trial. The second motion judge concluded that the hardship inquiry was not a critical stage of the proceedings and therefore did not implicate the defendants' constitutional rights. Additionally, the judge found that the argument regarding the exclusion of family members from jury selection was waived because it had neither been preserved at trial nor raised in the first motion for a new trial, and that the defendants failed to establish that it created a substantial risk of a miscarriage of justice.

[1] Discussion. The defendants' appeals from the denial of their motions for a new trial have been consolidated with their direct appeals from their convictions of murder in the first degree. We review both under G. L. c. 278, § 33E, and consider asserted errors in the motions for a new trial "to determine whether there has been a significant error of law or other abuse of discretion, ... and whether any such error creates a substantial likelihood of a miscarriage of justice." Commonwealth v. Vargas, 475 Mass. 338, 355, 57 N.E.3d 920 (2016), **565 quoting Commonwealth v. Lally, 473 Mass. 693, 698, 46 N.E.3d 41 (2016).

[2] [3] 1. Sufficiency of the evidence. The defendants maintain that the evidence presented at trial was insufficient to establish which gunshot wound was fatal, and that the trial judge's denial of their motions for a required finding of not guilty was therefore error because they were both tried as principals rather than on a joint venture theory. ¹⁰ We review the denial of a motion for

a required finding of not guilty to determine "whether the evidence offered by the Commonwealth, together with reasonable inferences therefrom, *398 when viewed in its light most favorable to the Commonwealth, was sufficient to persuade a rational jury beyond a reasonable doubt of the existence of every element of the crime charged." Commonwealth v. Whitaker, 460 Mass. 409, 416, 951 N.E.2d 873 (2011), quoting Commonwealth v. Lao, 443 Mass. 770, 779, 824 N.E.2d 821 (2005), S.C., 450 Mass. 215, 877 N.E.2d 557 (2007) and 460 Mass. 12, 948 N.E.2d 1209 (2011). See Commonwealth v. Latimore, 378 Mass. 671, 677-678, 393 N.E.2d 370 (1979).

[4] [5] The defendants challenge only the Commonwealth's proof of causation. "It is well established that there may be more than one proximate cause of a victim's death." Commonwealth v. Maynard, 436 Mass. 558, 563, 767 N.E.2d 1 (2002). The conduct of two or more persons is each a proximate cause of death if the conduct concurrently contributes to the death. Id. at 564, 767 N.E.2d 1. Such "[a] cause is concurrent if it was operative at the moment of death and acted with another cause to produce the death." Id.

We conclude that the evidence and the reasonable inferences that stem from it, when considered in the light most favorable to the Commonwealth, were sufficient to convict both defendants. The medical examiner determined that two separate gunshot wounds, one to the head and one to the back, were each "in and of [themselves] lethal." The medical examiner noted McCormack's cause of death as "multiple gunshot wounds." The two gunshots were fired from two different weapons. The gunshot to the head was from a .40 caliber firearm. The gunshot to the back was from a different firearm of an undetermined caliber. The witness described the two defendants as the only two shooters.

We find support in several past decisions of this court. The Maynard case and Commonwealth v. Perry, 432 Mass. 214, 733 N.E.2d 83 (2000), involved a victim who was subjected to numerous blunt force injuries and starvation over several months by the respective defendants. Maynard, 436 Mass. at 559-561, 767 N.E.2d 1. Perry, 432 Mass. at 215-219, 733 N.E.2d 83. In those cases, which each considered the same murder, the medical examiner testified that he could not determine which act was fatal, but that "the cumulative effect of the beatings and starvation led to the victim's death." Perry, supra at

220-221, 733 N.E.2d 83. See Maynard, supra at 563, 767 N.E.2d 1. We concluded that there was sufficient evidence to convict the defendants under both principal and joint venture theories of liability. Id. at 565, 767 N.E.2d 1. Perry, supra at 221, 733 N.E.2d 83. In this case, the evidence that the defendants caused McCormack's death is much stronger than it was in the Perry and Maynard cases. The judge's denial of the defendants' motion for a required finding of not guilty was proper.

*399 **566 [6] 2. First motion for a new trial. The defendants maintain that the Commonwealth intentionally withheld hospital records from a visit Porreca made to Saints Memorial Hospital on April 21, 1999. Porreca complained that he was in heroin withdrawal and requested methadone, and the defendants argue that the temporal proximity of this withdrawal to the shooting would have undermined Porreca's testimony that he was not influenced by drugs at the time of the shooting. This, the defendants contend, prejudiced their defense in such a way that their first motion for a new trial should have been allowed.

[9] [7] [10]'provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness.' "Commonwealth v. Watkins, 473 Mass. 222, 231, 41 N.E.3d 10 (2015), quoting Commonwealth v. Daniels, 445 Mass. 392, 401-402, 837 N.E.2d 683 (2005). "To obtain a new trial on the basis of nondisclosed exculpatory evidence, a defendant must establish (1) that 'the evidence [was] in the possession, custody, or control of the prosecutor or a person subject to the prosecutor's control'; (2) 'that the evidence is exculpatory'; and (3) 'prejudice.' "Commonwealth v. Sullivan, 478 Mass. 369, 380, 85 N.E.3d 934 (2017), quoting Commonwealth v. Murray, 461 Mass. 10, 19, 21, 957 N.E.2d 1079 (2011). The first motion judge determined, and we agree, that the defense did not make a specific discovery request that encompassed Porreca's medical records. 11 Where no specific request for a particular piece of evidence is made, we determine *400 prejudice using the same standard "used to assess the impact of newly discovered evidence, that is, 'whether there is a substantial risk that the jury would have reached a different conclusion if the evidence had been admitted at trial." Murray, supra at 21, 957 N.E.2d 1079, quoting Commonwealth v. Tucceri, 412 Mass. 401, 413, 589 N.E.2d 1216 (1992). "Newly discovered evidence that tends merely to impeach the credibility of a witness will not ordinarily be the basis of a new trial." Sullivan, supra at 383, 85 N.E.3d 934, quoting Commonwealth v. Lo, 428 Mass. 45, 53, 696 N.E.2d 935 (1998).

Because we agree with the first motion judge that there is no substantial risk of an impact on the verdicts had evidence of Porreca's trip to Saints Memorial Hospital been before the jury, we need not address the other two factors underlying a new **567 trial motion on the basis of nondisclosed exculpatory evidence. See Sullivan, 478 Mass. at 380, 85 N.E.3d 934. Porreca was extensively cross-examined over the course of two days, during which he admitted that he was addicted to opiates, had often been paid in Percocet pills by Giangrande, had consumed two or three Percocet pills on the day of the shooting, and had consumed five or six beers while at the bar immediately before the shooting. He denied having been under the influence, at the time of the shooting, of the Percocet pills that he had consumed earlier in the day, [11] "Evidence is exculpatory if it as oning that he had consumed only two or three pills and that he would have needed to consume approximately five pills to feel any effect "because [his] system had been used to them." Porreca also testified that he had been given Percocet while in the hospital after the shooting, and was prescribed an additional ten Percocet pills on his discharge from the hospital on April 19.

> Given this testimony, the exculpatory nature of the evidence of Porreca's complaint of heroin withdrawal four days after the shooting was cumulative of evidence already before the jury, and we are not persuaded that it would have had an impact on the jury's verdicts. Porreca's drug use was well established, and he admitted that he consumed Percocet pills and drank several beers on the day of the shooting. His credibility was called into question extensively on cross-examination on several grounds, not limited to his drug use, and the jury nonetheless convicted the defendants. See Commonwealth v. Dubois, 451 Mass. 20, 28, 883 N.E.2d 276 (2008) ("The weight and credibility of the evidence is the province of the jury"). The Saints Memorial Hospital records, at most, would have provided additional grounds to impeach Porreca on the truthfulness of his testimony regarding his sobriety on the night of the *401 shooting. Commonwealth v. Lykus, 451 Mass. 310, 326, 885 N.E.2d

769 (2008) (evidence cumulative of that "admitted at the trial will carry little weight"). See Sullivan, 478 Mass. at 380, 85 N.E.3d 934. Had those records been available to the defense, there would not have been an impact on the jury's verdicts.

[12] 3. Second motion for a new trial. The defendants raise several arguments stemming from the denial of their second motion for a new trial. We address each in turn.

[13] [14] hearing. We first address the defendants' contention that the second motion judge's decision to proceed without an evidentiary hearing was error. We disagree. Under Mass. R. Crim. P. 30 (c) (3), as appearing in 435 Mass. 1501 (2001), a judge must determine whether the defendants' motion presents a "substantial issue" in deciding whether an evidentiary hearing is necessary. Commonwealth v. Denis, 442 Mass. 617, 628, 814 N.E.2d 1080 (2004). "Although the motions and supporting materials filed by a defendant need not prove the issue raised therein, they must at least contain sufficient credible information to cast doubt on the issue" in order to create a substantial issue. Id. at 629, 814 N.E.2d 1080. In determining whether a substantial issue exists, "a judge considers the seriousness of the issues raised and the adequacy of the defendant's showing on those issues." Commonwealth v. Torres, 469 Mass. 398, 402-403, 14 N.E.3d 253 (2014). Whether to hold an evidentiary hearing is a decision squarely within the judge's discretion, and we review the decision for an abuse of discretion. Denis, supra at 628, 814 N.E.2d 1080.

The second motion judge determined that an evidentiary hearing was unnecessary because the defendants did not raise a serious question and because the briefs, **568 supporting documents, and trial transcripts were sufficient to allow him to reach an informed decision. We conclude that the record before the judge and the contents of the reports and affidavits that formed the basis for the legal arguments raised in the second motion for a new trial did not require an evidentiary hearing, and that the judge's decision that an evidentiary hearing was not warranted was a proper exercise of his discretion. See Commonwealth v. McWilliams, 473 Mass. 606, 622-623, 45 N.E.3d 94 (2016).

b. Police reports. We next address the defendants' argument that the judge erred in declining to find a Brady violation. The defendants, having discovered additional law enforcement reports after their first motion for a new trial had been decided, presented three claimed new Brady violations based on those reports. The *402 judge did not err in concluding that there were no Brady violations.

[16] i. Montana report. The Montana report detailed an interview conducted by a member of the Medford police department during which an individual implicated a third party as the shooter in McCormack's murder, [15] a. Decision not to hold evidentiary indicated that "there was no way" that Barry was the shooter, and stated that Porreca had told the individual that he was willing to change his testimony in exchange for \$ 100,000. As there was no specific discovery request that encompassed this report, we analyze any error to determine "whether there is a substantial risk that the jury would have reached a different conclusion if the evidence had been admitted at trial." Murray, 461 Mass. at 21, 957 N.E.2d 1079, quoting Tucceri, 412 Mass. at 413, 589 N.E.2d 1216. Assuming without deciding that the Montana report satisfies the first two prongs of Brady, we conclude that there was no prejudice because the defendants cannot establish that the Montana report creates a substantial risk that the jury would have reached a different conclusion had it been admitted. See Murray, supra at 19-21, 957 N.E.2d 1079.

> The Montana report implicates a potential third-party culprit who had not otherwise been considered in the investigation. However, the report does not indicate the basis for the statement that Barry could not have been the shooter. See Tucceri, 412 Mass. at 414, 589 N.E.2d 1216 (if evidence "does not carry a measure of strength in support of the defendant, the failure to disclose that evidence does not warrant the granting of a new trial"). Finally, to the extent that evidence of Porreca's willingness to alter his testimony in exchange for money could have been used to impeach his credibility, "evidence that tends merely to impeach the credibility of a witness will not ordinarily be the basis of a new trial." Sullivan, 478 Mass. at 383, 85 N.E.3d 934, quoting Lo, 428 Mass. at 53, 696 N.E.2d 935. Moreover, any additional impeachment evidence, unsupported by details and uncorroborated by additional evidence, would not have influenced the jury's conclusion because Porreca's credibility was already very much called into question on cross-examination. We therefore conclude that there was no prejudice.

We further note that the individual who provided the information in the Montana report wrote an affidavit that undermines the exculpatory nature of the Montana report and led to an investigation that further inculpates the defendants. That person stated that he did not remember telling Sergeant Montana that Rennell shot McCormack or that Porreca stated that he was willing to *403 change his story and that neither of those things is true. He further discussed his relationship with an area drug dealer who had tried to sell him stolen guns from New Hampshire, and eventually sold Barry a .40 caliber **569 pistol. The pistol left at the scene of the shooting that was used to shoot McCormack in the head was confirmed to be a gun that had been stolen from a person in Derry, New Hampshire.

A motion for a new trial may be granted "if it appears that justice may not have been done." Mass. R. Crim. P. 30 (b). The exculpatory nature of the Montana report has since been recanted and prompted police investigation that directly tied Barry to one of the murder weapons. As we are considering whether substantial justice was done, we see no reason that we cannot consider additional evidence that stemmed from that police investigation. ¹² With the fruits of that investigation in mind, any argument that this report would warrant a new trial in the interests of justice is disingenuous.

[17] ii. ATF report. The defendants' asserted Brady violation stemming from the unredacted ATF report also fails, because the ATF report was not exculpatory. The report's only mention of McCormack's murder is that Porreca stated, "Anthony Barry, one of the shooters along with Brian Cahill, didn't get along with Paul A. Decologero." The defendants, however, maintain that Porreca's cooperation with law enforcement and the ATF report's discussion of the involvement of Decologero in the kidnapping provide for the possibility of a third-party defense, because the ATF report could arguably indicate that Decologero had motive to kill Porreca. But the ATF report inculpates the defendants by saying that they were the shooters. Any motive that could be gleaned from the ATF report would not be a significant enough aid to the defense to be deemed exculpatory.

[18] [19] [20] iii. Orlando reports. Lastly, we address 246. the three Orlando reports. Although the second motion judge treated the July 26, 2001, Orlando report as newly discovered evidence and reviewed *404 the July 17 and that

July 25 reports under Brady, we review all three Orlando reports as newly discovered evidence because they were all created after trial. "A defendant seeking a new trial on the ground of newly discovered evidence must establish both that the evidence is newly discovered and that it casts real doubt on the justice of the conviction." Commonwealth v. Grace, 397 Mass. 303, 305, 491 N.E.2d 246 (1986). As a threshold matter, newly discovered evidence "must be material and credible." Id. We conclude that the contents of the Orlando reports are not credible and therefore cast no doubt on the convictions.

The confidential informant in the Orlando reports told Trooper Orlando that he did not have firsthand knowledge of who the shooters were, that he was not present at the time of the murder, and that his information that Angelesco was the shooter and Giangrande the getaway driver was based on "word on the street." "
[W]ord on the street' carries no indicia of reliability by itself, and defense counsel did not bolster it by showing that the 'word' came from a percipient witness to the shooting." **570 Commonwealth v. Silva-Santiago, 453 Mass. 782, 804-805, 906 N.E.2d 299 (2009).
Because unsubstantiated rumors pointing to Angelesco and Giangrande as the true culprits do not cast doubt on the justice of the convictions, the existence of the Orlando reports does not require a new trial.

[21] c. Additional newly discovered evidence. In their second motion for a new trial, the defendants also relied on five additional pieces of purportedly newly discovered evidence: (1) additional evidence of Porreca's drug use ¹⁴; (2) an affidavit from Whitson; (3) an affidavit from Brittany Cahill; (4) evidence that Angelesco had committed a different murder; and (5) evidence of intimidation of potential witnesses before the hearing on the first motion for a new trial. Evidence is newly discovered if it was "unknown to the defendant or his counsel and not reasonably discoverable by them at the time of trial (or at the time of the presentation of an earlier motion for a new trial)." Grace, 397 Mass. at 306, 491 N.E.2d 246. Newly discovered evidence "must [also] carry a measure of strength in *405 support of the defendant's position," and will carry less weight if it "is cumulative of evidence admitted at the trial." Id. at 305-306, 491 N.E.2d

[22] i. Whitson affidavit. Whitson's affidavit indicates that he was inside the bar when the shooting took place

outside, that he spoke to Porreca after Porreca had been shot, and that Porreca "did not mention the names of Anthony Barry and Brian Cahill" to him. Whitson's affidavit directly contradicts a key portion of Porreca's testimony at trial, where Porreca stated that he ran into the bar after being shot and said "Fuck'n Barry and Cahill" to Whitson. However, the defendants have failed to establish that the contents of Whitson's affidavit were unknown to their counsel at the time of trial. When Porreca was about to testify that he had implicated the defendants to Whitson after being shot, Barry's counsel was heard at a sidebar conference. Counsel told the trial judge that "Whitson was interviewed by the grand jury and by police, he has denied that this statement was made ... by Porreca to him." Because defense counsel knew before trial that Whitson had said Porreca never implicated the defendants, Whitson's affidavit is not "newly discovered." See Grace, 397 Mass. at 306, 491 N.E.2d 246.

[23] ii. Brittany Cahill affidavit. Brittany Cahill testified against her brother and Barry at trial when she was fourteen years old. Her testimony indicated that Cahill and Barry planned to be together the night of the shooting, that Cahill laughed when reading a newspaper article about the shooting, that Cahill talked to himself while laughing as he drove by the bar three days after the shooting, that Cahill was counting \$ 900 in cash three days after the shooting at a time in which he was unemployed, and that Cahill told her, in a telephone call from jail several weeks after the shooting, not to give information to the police.

Her 2009 affidavit recanted portions of her testimony, in particular denying that Cahill had laughed while reading the newspaper, that he had laughed and talked to **571 himself while driving past the bar, or that he had stated that the \$ 900 he was counting was from "doing his business." She further indicated that her false testimony was the result of pressure from Trooper Manning, whom she claims said to her, among other things, that she would get in trouble if she did not testify against her brother. Assuming without deciding that Brittany Cahill's affidavit constitutes newly discovered evidence, her recantation is ultimately inconsequential to the outcome of the trial. There was significant evidence pointing to the defendants as the shooters, and although Brittany Cahill's testimony did have some corroborative value to the *406 Commonwealth's case, "the absence of [her recanted] testimony at trial would not have changed the verdict[s]." Commonwealth v. Spray, 467 Mass. 456, 472, 5 N.E.3d 891 (2014). See Grace, 397 Mass. at 306, 491 N.E.2d 246 ("The strength of the case against a criminal defendant ... may weaken the effect of [newly discovered] evidence").

[24] [25] iii. Evidence that Angelesco committed a different murder. The defendants next contend that they were entitled to a new trial because of evidence that Angelesco was indicted for a different murder that had similar facts to McCormack's murder. In that unrelated murder, of which Angelesco was acquitted, a gun was left at the scene, as was the case in McCormack's murder. Evidence of this separate murder is irrelevant to any thirdparty culprit defense the defendants may have raised at trial and would not have been admissible. "[I]n order to be admitted, third-party culprit evidence 'must have a rational tendency to prove the issue the defense raises, and [it] cannot be too remote or speculative." Commonwealth v. Scott, 470 Mass. 320, 327, 21 N.E.3d 954 (2014), quoting Silva-Santiago, 453 Mass. at 801, 906 N.E.2d 299. See Commonwealth v. Brusgulis, 406 Mass. 501, 506, 548 N.E.2d 1234 (1990) (modus operandi evidence only admissible if there is "a uniqueness of technique, a distinctiveness, or a particularly distinguishing pattern of conduct common to the current and former incidents"). This evidence does not warrant a new trial.

[26] iv. Witness intimidation. The defendants' final argument from their second motion for a new trial stems from their first motion for a new trial, as they allege that members of the State police intimidated five witnesses the defendants intended to call at the hearing on the first motion by executing search and arrest warrants against them. There is nothing in the record to suggest that those warrants were illegitimate, and the arrest reports note that they were the product of a "lengthy investigation." The criminal complaints against these five potential witnesses detail ongoing narcotics activity, and the defendants have provided no evidence to support their claims that law enforcement used these arrests as a means to dissuade the potential witnesses from testifying at the hearing on the first motion for a new trial. 15 The burden was on the defendants to prove the facts underlying their motion; as they failed to do so regarding their witness intimidation claim, their argument regarding the second motion for a new trial fails. See *407 Commonwealth v. Marinho, 464 Mass. 115, 123, 981 N.E.2d 648 (2013) ("A defendant bears the burden of proof on a motion for new trial").

[27] v. Court room closure. Cahill maintains that his right to a public trial was violated when the trial judge conducted the hardship voir dire in the jury room without counsel or defendants present, and **572 when the defendants' family members were excluded from the court room during jury selection. Because Cahill failed to object to either alleged error at trial, the claims are procedurally waived. See Commonwealth v. Robinson, 480 Mass. 146, 152, 102 N.E.3d 357 (2018) ("where a defendant fails to contemporaneously object to an improper court room closure at trial, we have steadfastly held that the defendant's claim is procedurally waived"). ¹⁶ Therefore, we review any error for a substantial likelihood of a miscarriage of justice, and having found nothing that calls into question the legitimacy of the jury's verdicts, we conclude that the defendants' motion for a new trial was properly denied on these grounds. See id. at 154-155, 102 N.E.3d 357.

[28] vi. DNA. The defendants challenge the second motion judge's determination that the DNA expert who testified at trial was not a substitute expert and that their claim that the method of testing was unreliable was unfounded. The defendants did not object to the DNA expert's testimony at trial, so we review their claim to determine whether there was error in allowing him to testify and, if so, whether that error created a substantial likelihood of a miscarriage of justice. We conclude that there was no error.

The expert was the director and vice-president of the laboratory where the testing took place, he detailed the procedure that would have taken place to test the samples, and he testified that, after reviewing the DNA samples, he had determined that the DNA found on the Nomex hood matched Cahill's DNA profile. He observed that "the probability of drawing at random a DNA pattern like that of Mr. Cahill's is one in [181] billion [among Caucasians *408]."

[29] [30] [31] "The critical issue with respect to an expert, including in particular a DNA analyst, is whether the defendant is able to cross-examine the expert in a meaningful way regarding possible flaws relating to the underlying data that forms the basis of his or her opinion." Commonwealth v. Chappell, 473 Mass. 191, 201, 40 N.E.3d 1031 (2015). The defendants' rights were protected in this case, because the DNA expert participated in

the analysis of the samples and testified about a report detailing his conclusions that he personally submitted to the prosecution. He was not a substitute expert, and his testimony did not implicate the confrontation clause. See Bullcoming v. New Mexico, 564 U.S. 647, 652, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011) ("The accused's right is to be confronted with the analyst who made the certification ..."). Cf. Commonwealth v. Tassone, 468 Mass. 391, 399, 11 N.E.3d 67 (2014) ("our common law of evidence requires that the defendant have a meaningful opportunity to cross-examine the expert about her opinion and the reliability of the facts or data that underlie her opinion"). Even if he were considered a substitute expert, his **573 testimony would have been admissible because there is no requirement that the person who physically tested DNA samples testify, and it is well established that an expert can testify to his own opinions after interpreting data and reaching his own conclusions. See Commonwealth v. Sanchez, 476 Mass. 725, 733, 73 N.E.3d 246 (2017); Commonwealth v. Greineder, 464 Mass. 580, 601-602, 984 N.E.2d 804, cert. denied, 571 U.S. 865, 134 S.Ct. 166, 187 L.Ed.2d 114 (2013); Commonwealth v. Barbosa, 457 Mass. 773, 791, 933 N.E.2d 93 (2010), cert. denied, 563 U.S. 990, 131 S.Ct. 2441, 179 L.Ed.2d 1214 (2011). Cf. Chappell, supra at 202, 40 N.E.3d 1031 ("under Massachusetts law, an expert witness is not permitted to testify on direct examination to facts or data that another, nontestifying expert has generated, or to the nontestifying expert's own opinion, even though this information may be an important part of the basis of the testifying expert's opinion").

The defendants further assert that the DNA testing, which compared Cahill's blood sample and the DNA sample from the Nomex hood using eight loci, was unreliable when considered in light of subsequent scientific advancements. The defendants contend that because testing involving thirteen loci would "offer[] a material improvement in accuracy," there was a substantial likelihood of a miscarriage of justice. See Commonwealth v. Donald, 468 Mass. 37, 45-46, 8 N.E.3d 727 (2014) (analysis using thirteen loci reduced probability of random match to one in several trillion or quadrillion). However, the defendants have not called into question the *409 legitimacy of the expert's conclusion that the probability of a random match was one in 181 billion. That another method of testing may have yielded an even more reliable result does not create a substantial likelihood of a miscarriage of justice.

[32] vii. Pretrial disclosure and the confrontation clause. The defendants asserted in their second motion for a new trial that the failure to turn over medical evidence regarding Porreca's drug use violated their right to confrontation. The second motion judge gave little credence to this argument, because it is well established that the right to confrontation is a trial right and is inapplicable to pretrial discovery under both art. 12 of the Massachusetts Declaration of Rights and the Sixth Amendment to the United States Constitution. See Commonwealth v. Figueroa, 79 Mass. App. Ct. 389, 400, 946 N.E.2d 142 (2011), quoting Pennsylvania v. Ritchie, 480 U.S. 39, 53, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). The defendants now ask us to depart from precedent and extend the right to confrontation. We decline to do so.

[33] [34] "[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused." Crawford v. Washington, 541 U.S. 36, 50, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). "A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), citing Crawford, supra at 54, 124 S.Ct. 1354. The right to confrontation, under both art. 12 and the Sixth Amendment, has been considered to be a trial right. Figueroa, 79 Mass. App. Ct. at 400, 946 N.E.2d 142. There was no error in the second motion judge's treatment of the right to confrontation as such, and we conclude that there is no reason to depart from that interpretation.

**574 4. Identity of confidential informant. In December 2015, the defendants filed a discovery motion seeking, in part, the disclosure of the identity of the confidential informant discussed in the Orlando reports. The motion was denied. The second motion judge determined that the Commonwealth had established that disclosing the informant's identity would endanger the informant, and that the defendant failed to show that the "informant privilege" interfered with a fair defense. The defendants now contend that the judge erred in denying the motion. We conclude that there was no error.

[35] The defendants contend that the Orlando reports indicate that the confidential informant had firsthand knowledge that Angelesco, *410 not the defendants, murdered McCormack, and that Giangrande "drove the getaway vehicle." As discussed supra, the Commonwealth filed an affidavit by Sergeant Orlando clarifying that the confidential informant did not have firsthand knowledge, was not a percipient witness, and did not hear the information from Angelesco or Giangrande, but rather learned it through "word on the street." The Commonwealth withheld the confidential informant's identity under the "informant privilege." The informant privilege "may be asserted where the Commonwealth otherwise would be required to provide an informant's identity to a defendant as part of its discovery obligations." ¹⁷ Commonwealth v. Bonnett, 472 Mass. 827, 846, 37 N.E.3d 1064 (2015). The privilege's rationale "is the need to encourage 'citizens to communicate their knowledge of the commission of crimes to lawenforcement officials." Id., quoting Roviaro v. United States, 353 U.S. 53, 59, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957).

[36] [37] [38] [39] Determining whether an informant's identity was properly withheld requires a two-step inquiry. In the first stage, we must determine "(a) whether the Commonwealth has properly asserted an informant privilege, and (b) whether the defendant has adequately challenged the assertion of the privilege as an impermissible interference with his or her right to present a defense." Bonnett, 472 Mass. at 846, 37 N.E.3d 1064. The Commonwealth may assert the privilege only where "disclosure would endanger the informant or otherwise impede law enforcement efforts." Id. at 847, 37 N.E.3d 1064. If the Commonwealth has properly asserted the privilege, "the defendant may request that the privilege be set aside on the grounds that it 'interferes with a fair defence.' " Id., quoting Commonwealth v. Johnson, 365 Mass. 534, 544, 313 N.E.2d 571 (1974). In so requesting, a defendant must "present 'some offering so that the trial judge may assess the materiality and relevancy of the disclosure to the defense," " but only if it "is not apparent from the nature of the case and the defense offered thereto." Bonnett, supra, quoting Commonwealth v. Kelsey, 464 Mass. 315, 323, 982 N.E.2d 1134 (2013).

[40] If the Commonwealth properly invoked the privilege and the defendants adequately challenged the assertion of the privilege, then we move to the second step and balance "the public interest in protecting the flow of information against the [defendant]'s right to prepare his defense." *411 Commonwealth v. Dias, 451 Mass. 463, 468, 886 N.E.2d 713 (2008). In doing so, we consider "the crime charged, the possible defenses, the possible significance of the [privileged] testimony, and other relevant **575 factors." Id. at 468-469, 886 N.E.2d 713, quoting Roviaro, 353 U.S. at 62, 77 S.Ct. 623.

[41] We agree with the second motion judge that the Commonwealth properly invoked the informant privilege. As the Commonwealth noted, the individuals identified in the Orlando reports have a history of violent crimes, including against witnesses in this case. ¹⁸ The threat of violence against witnesses posed by these individuals has been so great that a single justice of this court ordered the deposition of Porreca before trial, out of concern that he would be killed before testifying. Porreca remained in hiding for at least eighteen months before the defendants' trial, in part out of fear of retribution by Angelesco and Giangrande.

[42] We also agree with the second motion judge that the defendants failed to challenge adequately the assertion of the privilege. While the confidential informant's identity and the information that might be gained from the informant was certainly relevant to the defendants' theory, the defendants failed to establish

its materiality. The confidential informant provided no details "beyond a threadbare rumor" to support his allegation that Angelesco and Giangrande committed the murder. Bonnett, 472 Mass. at 849, 37 N.E.3d 1064. The confidential informant was also not a percipient witness and had not learned the information from a percipient witness or the alleged killers. Contrast id. ("At a minimum, the question whether the informant was a percipient witness to the shooting, or whether he had spoken to a percipient witness, should have been explored"). Rather, the confidential informant was merely relaying inadmissible, immaterial "word on the street" information about the killing. We conclude that the judge properly denied the defendants' motion for disclosure of the confidential informant's identity.

5. Review under G. L. c. 278, § 33E. Having carefully reviewed the entire record pursuant to our duty under G. L. c. 278, § 33E, *412 we discern no reason to order a new trial or to reduce the degree of guilt.

Judgments affirmed.

All Citations

481 Mass. 388, 116 N.E.3d 554

Footnotes

- 1 Four against Anthony Barry and five against Brian Cahill.
- Each defendant was also convicted of armed assault with intent to murder, G. L. c. 265, § 18 (b); two counts of assault and battery by means of a dangerous weapon, G. L. c. 265, § 15A (b); and unlawful possession of a firearm, G. L. c. 269, § 10 (a).
- 3 Stephen Almeida had gone back into the bar to get John Whitson.
- 4 Gene Giangrande was a local bookmaker and drug dealer for whom Brian Porreca collected debts and who was best friends with Anthony Barry. Both defendants were part of Giangrande's "crew."
- Nomex hoods were described as similar to those worn by football players or law enforcement in cold weather; they adhere tightly to the head but reveal much of the wearer's face, including the eyes, nose, and cheeks.
- 6 We limit our discussion of the decision on the first motion for a new trial to the lone portion that the defendants assert was erroneous.
- 7 The trial judge did not preside over the motion for a new trial.
- The judge who decided the second motion for new trial was neither the trial judge nor the judge who decided the first motion for a new trial.
- The only evidence in the July 26 Orlando report that was not included in the first two Orlando reports was a discussion of a dispute at a strip club in Rhode Island where Angelesco allegedly attempted to calm the situation by telling a Rhode Island man involved in the same organized crime syndicate that they were "with the same people."
- The defendants' trial took place before this court's decision in Commonwealth v. Zanetti, 454 Mass. 449, 910 N.E.2d 869 (2009), which the Commonwealth notes changed its practice in pursuing a theory of joint venture liability in cases like this.

- The defendants maintain that we should depart from the first motion judge's determination and conclude that one portion of their 1999 discovery motion should be considered a specific request for documents including records of Porreca's visit to Saints Memorial Hospital on April 21. That request was made as follows: "Any material relating to the witness' mental or physical history that tends to impair or reflect adversely on his reliability as a witness, including but not limited to any information that would tend to affect the witness' motive to testify or ability to perceive, recall, or understand events." The defendants' discovery motion was amended, and the section in question was edited to state: "Any material [that] would tend to affect the witness' motive to testify or ability to perceive, recall, or understand events." We agree with the judge that Porreca's medical records were not specifically requested, in either the original or amended motion, as a specific request puts the prosecutor on "notice of exactly what the defense desired." United States v. Agurs, 427 U.S. 97, 106, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Cf. Commonwealth v. Healy, 438 Mass. 672, 680 n.9, 783 N.E.2d 428 (2003) (defendant's request for "reports of mental or physical examinations and of scientific tests' qualifies as a 'specific request' " for "postmortem report").
- The defendants contend that the second motion judge violated their right to due process by relying on evidence that the Commonwealth obtained after the defendants' convictions. The Montana report led police to discover, among other things, evidence that Barry had purchased the .40 caliber pistol that was left in the bar's parking lot and matched the bullet recovered from McCormack's skull. Because we have concluded, without considering that evidence, that there was no Brady violation stemming from the Montana report, any error by the judge in relying on later discovered evidence implicating Barry would be harmless. See Commonwealth v. Amirault, 424 Mass. 618, 649, 677 N.E.2d 652 (1997).
- The standard articulated in Commonwealth v. Silva-Santiago, 453 Mass. 782, 906 N.E.2d 299 (2009), regarding the standard of admissibility for evidence offered in support of a defense under Commonwealth v. Bowden, 379 Mass. 472, 485-486, 399 N.E.2d 482 (1980), was recently clarified in Commonwealth v. Moore, 480 Mass. 799, 809 n.9, 109 N.E.3d 484 (2018). Otherwise, the Silva-Santiago decision remains binding.
- 14 The defendants do not contest the second motion judge's ruling relating to Porreca's intoxication.
- One of the men did, in fact, testify at the hearing on the first motion for a new trial.
- Cahill urges us to revisit our waiver rules in light of the United States Supreme Court's decision in Weaver v. Massachusetts, U.S. —, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017). He argues that, under Weaver, a failure to make a public trial objection at trial constitutes waiver only for defendants who raise the issue for the first time on appeal as part of an ineffective assistance claim rather than as a public trial claim. But in Commonwealth v. Robinson, 480 Mass. 146, 154, 102 N.E.3d 357 (2018), a case decided after Weaver, we observed that this is a distinction without a difference: "For purposes of determining whether the defendant's claim was properly preserved at trial, it is ... legally irrelevant that [the defendant] now presents the claim as a Sixth Amendment violation rather than a claim that his counsel provided ineffective assistance by failing to perceive and object to the closure."
- 17 There is apparently no disagreement that, absent assertion of the informant privilege, the identity of the confidential informant would be discoverable under Mass. R. Crim. P. 14, as appearing in 442 Mass. 1518 (2004).
- Angelesco pleaded guilty to the 2006 stabbing of a witness who, at the hearing on the defendants' first motion for a new trial, had accused Angelesco of committing the murder. The State police have also received reports that Angelesco and Giangrande were seeking retribution against another witness who implicated them in the killing.
- Because we agree that the defendants failed to establish the materiality of the confidential informant's identity, we do not reach the balancing test that constitutes the second stage of the analysis.

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

S COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT CRIMINAL ACTION No.1999=00882,00883

COMMONWEALTH

vs.

ANTHONY BARRY & BRIAN CAHILL

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' (SECOND) MOTION FOR A NEW TRIAL

On April 21, 2000, after a fourteen-day trial, a Middlesex jury found defendants Anthony Barry ("Barry") and Brian Cahill ("Cahill") (together, the "defendants") guilty of the first degree murder of Kevin McCormack (the "victim" or "McCormack"), of armed assault and battery with intent to murder Brian Porreca in violation of G.L. c. 265, § 18(b)(2), of possession of firearms without a license in violation of G.L. c. 269, § 10(a), and of two counts of assault and battery with a dangerous weapon against Brian Porreca and Lindsay Cremone in violation of G.L. c. 265, § 15A(b). This Court (Barton, J.) sentenced the defendants to life terms on the murder conviction, and to concurrent terms on the other remaining convictions.

The defendants filed the present motion for a new trial, their second, in November, 2014, and the Commonwealth filed its opposition in November, 2015. The defendants argue that they are entitled to a new trial for a number of reasons. These reasons include the Commonwealth's alleged withholding of material and exculpatory third-party culprit evidence in violation of Brady v. Maryland. 373 U.S. 83 (1963), as well as the claimed revelation of newly discovered evidence

¹Defendant Barry was convicted of possession of a .40 caliber pistol; defendant Cahill was convicted of possession of a .9 millimeter pistol.



casting doubt on the justice of their convictions. For the following reasons, the defendants' motion shall be **DENIED**.

BACKGROUND

The Court summarizes the background of this case briefly, reserving additional facts for later discussion.

I. The Events of April 17, 1999

At around 12:15 a.m. on April 17, 1999, the victim, Brian Porreca ("Porreca"), Stephen Almeida ("Almeida"), Lindsay Cremone ("Lindsay"), and Kristen Terfry ("Terfry") left Cremone's Restaurant ("Cremone's") in Malden, Massachusetts, using the restaurant's alleyway door. They stood in the alley and briefly discussed going to a bar in Boston, and then walked to a white Oldsmobile parked in Cremone's parking lot. Before they reached the car, the victim asked Almeida to return to Cremone's to tell John Whitson ("Whitson") that they were leaving. The four others reached the car, whereupon the victim got into the driver's seat, Lindsay got into the backseat on the driver's side, and Terfry got into the front passenger's seat. Porreca went to open the backseat passenger's side door; and, as he did so, he heard voices from behind the Oldsmobile. Porreca then looked in that direction, and saw the defendants running toward the car.

One person, whom Porreca identified as Barry, ran toward the car with his hands drawn, a "hooded-type sweatshirt" covering most of his face. (Trial Transcript, Volume V, at 84; Trial Transcript VI, at 154.) Barry thereupon shot the victim's head through the open, driver's side back door. Another shooter, whom Porreca identified as Cahill, approached the car from the passenger's side and shot at the vehicle multiple times. Cahill was wearing "something over his

head, like a hood, . . . that seemed to be field tight around the neck" (Trial Transcript VI, at 154.) Cahill shot Lindsay twice in her arm and once in her leg, and shot Porreca once in his stomach and once in his wrist. Porreca then ran toward Cremone's; and, when he looked back at the white Oldsmobile, he saw Cahill turn toward the car and heard a lot of gunshots.

After the gunshots subsided, Porreca saw a dark, mid-size vehicle speeding out of the parking lot. Paul Buckley ("Buckley"), a resident of Whitman Street in Malden, returned home just before midnight on April 16, 1999. While Buckley was watching television, he heard several gunshots; and, immediately following that noise, he heard a car engine "revving extremely hard" and saw a full-size four-door sedan speed down his street without its lights on. (Trial Transcript, Volume V, at 190.)

After the gunfire subsided, Terfry, who had not been shot, ran back into Cremone's to get help. Two other individuals who had been standing in the alleyway at the time of the shooting,

June Drea and Kenneth Madill, likewise heard the gunshots, and ran into Cremone's to tell the bartender to contact the police.

Meanwhile, Almeida had returned to Cremone's to let Whitson know that the group was leaving. As they approached the door to leave, however, they heard gunshots. Porreca then walked into Cremone's and yelled for the people inside to call 911. Porreca "passed right by [Almeida,]" who "wasn't paying attention, really." (Trial Transcript, Volume V, at 116-17.)

June Drea and Kenneth Madill then heard Porreca say that he had been shot, and June Drea saw him holding his stomach.

Less than a minute after going inside Cremone's, Porreca walked back outside to the parking lot. He thereupon saw Whitson and said to him, "F***ing Barry and Cahill." (Trial

Transcript, Volume VI, at 167.) Immediately after seeing Whitson, Porreca saw Karen Minichello ("Minichello"), the girlfriend of Porreca's friend, Gene Giangrande. Porreca told Minichello, "'Tell Gene I'm going to blow his f***ing head off." (Trial Transcript, Volume VI, at 169-70.) A minute or two later, emergency personnel arrived on the scene.

II. The Jury Trial

The Court incorporates by reference the statement of the evidence presented at the jury trial as set forth in this Court's (Butler, J.) August, 2003 decision denying the defendants' first new trial motion.

III. First New Trial Motion

The defendants first moved for a new trial in May, 2002.² At that time, the defendants argued that the Commonwealth had failed to disclose exculpatory evidence from hospital records concerning Brian Porreca; that there was newly discovered evidence concerning Porreca's credibility and the purported involvement of Gene Giangrande ("Giangrande") and William Angelesco ("Angelesco") in the murder; and that they had received ineffective assistance from their trial attorneys. After a three-day evidentiary hearing, the Court (Butler, J.)³ issued a 33-page decision in August, 2003, denying the defendants' joint motion (the "August 2003

²The defendants are not presently appealing their convictions. They filed timely notices of appeal in April, 2000, and their case was docketed in the Supreme Judicial Court in September of 2001 as <u>Commonwealth</u> v. <u>Barry & Another</u>, SJC-08635. In December, 2014, however, the Supreme Judicial Court issued an order staying further appellate proceedings pending resolution of the present motion for a new trial.

³The trial judge had since retired.

Decision").4

A. Failure to Disclose Exculpatory Evidence

The Court acknowledged that the records from Saints Memorial Hospital concerning Porreca's drug abuse were exculpatory, as the records could "serve to impeach" Porreca as a witness by demonstrating that his drug use "impair[ed] the witness's ability to perceive and to remember correctly'...." (August 2003 Decision, at 29 (citations omitted).) Additionally, the Court found that the police did withhold this information, and that "[t]he absence of any police reports memorializing Porreca's hospital treatment suggests that the investigating officers, who were members of the prosecution team, intended to keep the incident secret from defense counsel." (Id.)

Such evidence, however, was determined not to carry sufficient strength in support of the defendants to warrant a new trial. (August 2003 Decision, at 29-30, 32.) Although the hospital records "possessed irrefutable impeachment value" that defense counsel could have used to "cast serious doubt on Porreca's claim that he was not an active addict at the time of the shooting[,] ... the defendants were aware of Porreca's drug use and addiction" both before and after the trial. (August 2003 Decision, at 30-31 (setting forth evidence demonstrating defendants' knowledge, both before and during trial, of Porreca's drug use and addiction).) "Cumulative evidence to the effect that Porreca visited a hospital and complained that he was withdrawing from opiates would not have been significant." (August 2003 Decision, at 32.) The defendants were thus not entitled to a new trial on this basis. (Id.)

⁴The August 2003 Decision is Exhibit O to the Defendants' Motion, and Exhibit D to the Commonwealth's Opposition.

B. Other Newly Discovered Evidence

The defendants additionally attempted at hearing to attribute (via hearsay) the subject shootings to Gene Giangrande and William Angelesco. The Court, however, found that the hearsay statements were not credible: "Not surprisingly, most of the witnesses who submitted affidavits attributing these hearsay statements to Porreca, Giangrande, and Angelesco, did not come forward at the evidentiary hearing. These affiants included Anthony M. Insogna, Christian Petrillo, Mark Doherty, Kenneth Nestor, Michael Lawhorne, Joseph Sacco, and Michael Barry." (August 2003 Decision, at 32.)

The defendants further offered the affidavit of Brian Tivnan, which the Court characterized as "the only substantive non-hearsay evidence presented by the defendants in support of their motion for an evidentiary hearing" (Id.) The Court, however, did not find this affidavit to be credible, and accordingly placed no weight upon it. Notably, the affiant attended the hearing on the defendants' motion for a new trial; "but when faced with the prospect of the prosecutor actually exploring the veracity of the claims contained in his affidavit, Tivnan asserted his Fifth Amendment rights against self-incrimination." (Id.)

C. Porreca's Alleged Beilef in Aliens

The Court held that the defendants did not make a "sufficiently convincing showing" that Porreca believed in aliens, or that this "belief" was newly discovered. (August 2003 Decision, at 33.) Moreover, the defendants did not present evidence establishing that the Commonwealth was in possession of and withheld information regarding Porreca's alleged belief in aliens. (Id.)

D. Ineffective Assistance of Counsel

The defendants did not present any credible evidence "that the experienced defense

attorneys who tried the case in front of the experienced Superior Court judge were ineffective with respect to any issue concerning Porreca's credibility." (August 2003 Decision, at 34.)

DISCUSSION

I. Mass. R. Crim. P. 30(b) Standard

"The trial judge upon a motion in writing may grant a new trial at any time if it appears that justice may not have been done." Mass. R. Crim. P. 30(b); see Commonwealth v. Buck, 64 Mass. App. Ct. 760, 766 (2005) (holding that determination under Rule 30(b) of whether justice was done, "while informed by the strength of evidence as it may have influenced the jury's verdict, ... is not dependent on the actual guilt or innocence of the defendant" (citations omitted)). As the trial judge in the present case has since retired, this motion is before a different judge.⁵ See Commonwealth v. Yancv, 440 Mass. 234, 235 (2003); Commonwealth v. Carter, 423 Mass. 506, 512 n.7 (1996) ("It is well settled that, although it is preferable that such motion be decided by the original trial judge, decision by a different judge of the same court is entirely proper."). While the granting of a new trial lies within the sound discretion of the judge, "that discretion is not boundless and absolute." Commonwealth v. Genius, 402 Mass. 711, 714 (1988), citing Commonwealth v. Preston, 393 Mass. 318, 324-25 (1984). "A strong policy of finality limits the grant of new trial motions to exceptional situations, and such motions should not be allowed lightly." Commonwealth v. <u>Ubeira-Gonzalez</u>, 87 Mass. App. Ct. 37, 39-40 (2015) (citation omitted). For this reason, "[j]udges are to apply the standard set forth in rule 30(b) rigorously and should only grant such a motion if the defendant comes forward with a credible reason which outweighs the risk of prejudice to the Commonwealth."

⁵The judge who decided the first new trial motion has likewise retired.

Commonwealth v. Wheeler, 52 Mass. App. Ct. 631, 635-36 (2001); see also Commonwealth v. Marinho, 466 Mass. 115, 123 (2013) ("A defendant bears the burden of proof on a motion for a new trial" (citation omitted)).

II. Evidentiary Hearing

A motion judge "has flexibility to choose the procedure by which to consider" a new trial motion. Commonwealth v. Grace, 397 Mass. 303, 313 (1986); Commonwealth v. Laguer, 89 Mass. App. Ct. 32, 40 (2016) (same). "In adjudicating a motion for a new trial, the 'judge may rule on the issue or issues presented by such motion on the basis of the facts alleged in the affidavits without further hearing if no substantial issue is raised by the motion or affidavits.'"

Commonwealth v. Dravton, 473 Mass. 23, 31 (2015), quoting Mass. R. Crim. P. 30(c); see also Reporter's Notes to Mass. R. Crim. P. 30(c) ("The primary purpose of subdivision (c)(3) is to encourage the disposition of post conviction motions upon affidavit."). "The decision to hold an evidentiary hearing on a motion for a new trial is 'left largely to the sound discretion of the judge[,]" Commonwealth v. Vaughn, 471 Mass. 398, 404 (2015), and "expenditure of limited public resources is reserved only for a case that truly warrants revisitation of a final judgment in the interests of justice." Commonwealth v. Lopez, 426 Mass. 657, 663 (1998). "When a substantial issue has been raised, and supported by a substantial evidentiary showing,' however, 'the judge should hold an evidentiary hearing." Dravton, 473 Mass. at 31 (citation omitted).

"In determining whether a "substantial issue" meriting an evidentiary hearing . . . has been raised, [courts] look not only at the seriousness of the issue asserted, but also to the adequacy of the defendant's showing on the issue raised." <u>Vaughn</u>, 471 Mass. at 404 (ellipses in original) (citation omitted). "In determining the adequacy of the defendant's showing, the

motion judge may consider whether the motion and affidavits contain credible information of sufficient quality to raise a serious question." Id. In essence, the judge is called upon to assess the credibility of the defendant's claims. Id. See also Drayton, 473 Mass. at 24, 36 (holding that defendant "raise[d] a substantial issue, warranting an evidentiary hearing," where newly discovered affidavit "would have been critical to the defense" because it "directly contradicte[d]" witness whose testimony constituted the "bulk of the evidence at trial against the defendant[,]" and without that witness's testimony "there [was] no evidence that [made] it more likely than not ... that the defendant ... was the perpetrator").

After searching review, the Court has determined that an evidentiary hearing in the present case is unnecessary. The defendants have failed to raise a serious question within the meaning of Rule 30(b), and the parties' extensive briefing and supporting submissions (combined with the trial transcript) are fully sufficient to enable the Court to reach an informed decision. The undersigned held a lengthy non-evidentiary hearing on August 5, 2016, addressed to the defendants' second new trial motion, and the rulings of the Court follow.

III. Alleged Brady Violations

In <u>Brady</u> v. <u>Maryland</u>, 373 U.S. 83 (1963), the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." <u>Id.</u> at 87. In Massachusetts, "[t]o establish a <u>Brady</u> violation, a defendant must show that (1) material information was in possession of the prosecutor or 'those police who are participants in the investigation and presentation of the case,' . . . ; (2) the information tended to exculpate him; and (3) the prosecutor failed to disclose the

evidence." <u>Commonwealth</u> v. <u>Caillot</u>, 454 Mass. 245, 261-62 (2009) (citations omitted). "This obligation is one of disclosure; it imposes no obligation on the prosecution to gather evidence or conduct additional investigation." <u>Id.</u> at 262.

The defendants allege that the Commonwealth violated <u>Brady</u> by failing to disclose four specific pieces of evidence: (1) two reports that Sergeant Nunzio Orlando ("Orlando") of the Massachusetts State Police Special Services Section authored in July, 2001 (collectively, the "Orlando Reports"); (2) an unredacted copy of a Bureau of Alcohol, Tobacco and Firearms ("ATF") report dated January 4, 2000 (the "ATF Report"); and (3) a report that Medford Police Sergeant David Montana ("Montana") wrote in March 2000 (the "Montana Report"). These items of evidence are addressed below.

A. Evidence

1. Orlando Reports

In the first Orlando Report, dated July 17, 2001, the unredacted portion of the narrative states: "The CI stated that Angelesco 'got straightened out' because he shot and killed 'Mucka McCormack in Malden." (Exhibit N to Commonwealth's Opposition.) In the second Orlando Report, dated July 25, 2001, the unredacted portion of the narrative states:

"According to the CI, Angelesco 'earned his bones' by killing 'Mucka' McCormack. The CI stated that contrary to popular belief, Anthony Barry was not the shooter in the McCormack murder. Barry was behind the scenes as far as orchestrating McCormack's assasination [sic], but Angelesco and Cahill were the actual shooters. In addition, Gene Giangrande allegedly drove the getaway vehicle."

(Exhibit O to Commonwealth's Opposition.) The defendants argue that the Orlando Reports

incriminate Angelesco, and thus constitute exculpatory third-party culprit information.⁶

2. Montana Report

The Montana Report, dated March, 2000, concerns Montana's interview with one Mark Silverman ("Silverman"). (Exhibit K to Defendants' Motion.) Silverman is therein reported to have told Montana that Robert Rennell, and not defendant Barry, killed McCormack and shot Porreca, and that Porreca had told him that he (Porreca) wanted \$100,000 to change his story. The Commonwealth turned the Montana Report over to the defendants in June, 2004. The defendants argue that the Montana Report constitutes exculpatory third-party culprit evidence, and further calls into question Porreca's credibility.

3. ATF Report

The portion of the January, 2000 ATF Report that is not redacted states as follows:

"PORRECA stated that Johnnie DECOLOGERO and Kevin McCORMACK hung around together. PORRECA spoke with Johnnie DECOLOGERO Friday night, April 16, 1999, at Cremone's Restaurant. PORRECA states that Johnnie DECOLOGERO left Cremone's approximately one hour before the shooting in which McCORMACK was murdered and PORRECA was wounded. PORRECA stated that Anthony BARRY, one of the shooters along with Brian CAHILL, didn't get along with Paul A. DECOLOGERO. Barry owes DECOLOGERO eight or ten thousand dollars for ten pounds of marijuana. BARRY didn't pay DECOLOGERO because DECOLOGERO is incarcerated."

(Exhibit S to Defendants' Motion (capitalization in original).)

B. Failure to Disclose Evidence in Prosecutor's Possession

1. Orlando Reports

For several reasons, each independently sufficient, the defendants cannot demonstrate

⁶In a separate decision dated February 1, 2016, this Court denied the defendants' request to order the Commonwealth to disclose the identity of Orlando's confidential informant.

that the Commonwealth suppressed the Orlando Reports. First, the Orlando Reports were created in July, 2001. Therefore, as the reports did not exist until well *after* the defendants' April, 2000 trial, the Commonwealth could not have turned them over to the defendants. Second, in his affidavit, Orlando states that he never turned his reports over to the Middlesex County district attorney's office. (Exhibit S to Commonwealth's Opposition, pars. 9, 13.) That office could thus not have had a <u>Brady</u> disclosure obligation.

Third, the Special Services Section of the Massachusetts State Police was at no time involved in the investigation of the victim's murder in this case. Therefore, any reports that this section generated are not considered to be within the Commonwealth's possession. (Exhibit S to Commonwealth's Opposition, par. 5; Exhibit R to Commonwealth's Opposition, par. 9); see also Commonwealth v. Murray, 461 Mass. 10, 19 (2011) ("A police officer is subject to the prosecutor's control when he acts as an agent of the government in the investigation and prosecution of the case."). Compare Commonwealth v. Lvkus, 451 Mass. 310, 328 (2008) (holding that FBI's "failure to produce the report . . . should be imputed to the Commonwealth" because defendant's case was "a joint investigation by Federal and State authorities" where "[n]o less than nineteen FBI agents testified before the jury at the defendant's trial, and others were involved in the investigation" and where "[t]he heft of the Commonwealth's case was provided by the FBI') with Commonwealth v. Dave, 411 Mass. 719, 733-34 (1992) ("The Boston police were investigating [a] . . . murder [in another case]. The Essex County district attorney's office was investigating the ... murders [in this case]. Nothing in the record suggests that the prosecutor in this case had access to the Boston police department files. . . . [Thus,] the Commonwealth did not suppress the Boston police department reports "). The Special

Services Section is a "separate entity within the State Police from the State Police Unit attached to the Middlesex District Attorney's Office" (Exhibit S to Commonwealth's Opposition, par. 2; Exhibit R to Commonwealth's Opposition, par. 9.) The defendants have not provided any evidence to the contrary. The Court, therefore, credits Orlando's affidavit when it recites that the Orlando Reports were never turned over to the Commonwealth or otherwise within its control.

2. Montana Report

The defendants likewise cannot demonstrate that the Commonwealth suppressed the Montana Report. Tellingly, the Commonwealth turned over the Montana Report to the defendants at its own initiative in 2004. (See Exhibit R to Commonwealth's Opposition, par. 6.) Additionally, the author of the Montana Report, Sergeant Montana of the Medford Police Department, was not involved in the investigation of this case. His report, therefore, cannot be deemed to have been within the Commonwealth's possession before the Commonwealth obtained it in 2004. (Exhibit Q to Commonwealth's Opposition, par. 7); see also Murray, 461 Mass. at 19. Finally, the Montana Report indicates that Trooper Robert Manning ("Manning") of the Massachusetts State Police received a copy of the report. Manning was concededly involved in the investigation in this case, but he states in his filed affidavit that he never received a copy of the Montana Report. (Exhibit Q to Commonwealth's Opposition, par. 6.) The Court credits Manning's affidavit, particularly in light of the reinforcing fact that the Commonwealth did voluntarily turn the Montana Report over to the defendants in 2004.

⁷Moreover, upon receiving the Montana Report, the Commonwealth investigated the information contained therein. It did so at its own initiative, and notwithstanding the fact that the Commonwealth's <u>Brady</u> obligation does not require "the prosecution to gather evidence or conduct additional investigation." <u>Caillot</u>, 454 Mass. at 262.

3. AFT Report

The defendants have likewise failed to demonstrate that the Commonwealth suppressed the unredacted ATF Report. The Commonwealth turned over to the defendants a redacted copy of the ATF Report prior to the defendants' trial. The defendants have not established that the Commonwealth ever possessed an unredacted version of this report, a doubtful proposition given that a federal agency had created it in the context of investigating an individual who was not involved in the defendants' case. See Murray, 461 Mass. at 19.

C. Exculpatory Evidence

"Evidence is exculpatory if it 'provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, though not indispensable element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness." Commonwealth v. Watkins, 473 Mass. 222, 231 (2015). The defendants cannot demonstrate that the Orlando Reports, the Montana Report, or the unredacted ATF Report constitute exculpatory evidence so defined.

1. Orlando Reports

The Orlando Reports arguably constitute third-party culprit evidence, as both reports suggest that Angelesco killed the victim.⁸ "A defendant may introduce evidence that tends to show that another person committed the crime" Watkins, 473 Mass. at 233 (citation omitted). "The introduction of such evidence, however, is not without limit." Id. at 234. To be admissible, the third-party culprit evidence itself must have "a rational tendency to prove the

⁸Notably, this evidence does *not* preclude the material involvement of the defendants in the McCormack murder.

issue the defense raises, and the evidence cannot be too remote or speculative[.]" <u>Id.</u> (citation omitted).

The Orlando Reports would not likely be admissible at a new trial. They are, on their face, too speculative, given that the confidential informant's tendered information derives from "word on the street." (See Exhibit S to Commonwealth's Opposition, pars. 8, 12.) See Commonwealth v. Bonnett, 472 Mass. 827, 849 (2015) (holding that, "standing alone, 'word on the street' carries no indicia of reliability[,]" especially where informant's statement does not "provide details that [go] beyond a threadbare rumor" and where there is no "showing that the 'word' came from a percipient witness" (citation and internal quotation marks omitted)).

2. Montana Report

The Montana Report arguably contains third-party culprit evidence as well, because Mark Silverman's statement therein implicated Robert Rennell in McCormack's murder. The report also undermines Porreca's credibility, because Silverman is reported to have stated that Porreca wanted \$100,000 to change his story as to who had shot him and the victim. See Watkins, 473 Mass. at 231 (defining exculpatory evidence). Upon receiving the Montana Report in 2004, however, the Commonwealth conducted an investigation into the information contained within it; and that investigation yielded additional evidence implicating the defendants in McCormack's murder.

First, in August of 2004, the Commonwealth obtained an affidavit from Silverman, who not only denied having made the statements attributed to him in the Montana Report, but also directly incriminated the defendants in the victim's murder. In his affidavit, Silverman admits that he had met with Montana in March of 2000, but denies that he told Montana that Robert

Rennell was the shooter or that Porreca wanted \$100,000 to change his story: "[i]n any event, neither of these things are true[,]" he declares, as Barry had admitted to Silverman two days after the shooting that he had shot the victim. (Exhibit H to Commonwealth's Opposition, par. 16; see also Exhibit H to Commonwealth's Opposition, par. 13.) Silverman additionally states that he introduced Barry to Eric Furtado ("Furtado"), who had previously tried to sell Silverman guns that had been stolen in New Hampshire. (See Exhibit H to Commonwealth's Opposition, par. 8.) One of the stolen guns was a .40 caliber semi-automatic pistol, and Barry is reported to have expressed an interest in purchasing it. (See Exhibit H to Commonwealth's Opposition, par. 9.) One or two months later, Barry told Silverman that he was on his way to purchase the gun from Furtado; and, subsequently, when Silverman saw Barry again, Barry showed him the .40 caliber pistol that he in fact had purchased from Furtado. (See Exhibit H to Commonwealth's Opposition, pars. 10-11.)

Second, statements that Furtado had previously made in a June, 2003 affidavit confirm Silverman's account; and Furtado additionally named David Dube as the individual who had stolen the guns in New Hampshire. (Exhibit I to Commonwealth's Opposition, pars. 9-10, 15.) Finally, further investigation revealed that the .40 caliber pistol had been stolen in Derry, New Hampshire, and that David Dube had been involved in the subject burglary. (See Exhibit J to Commonwealth's Opposition.) That .40 caliber pistol was retrieved at the scene of the shooting, and ballistics testing established that it was, indeed, the McCormack murder weapon. (See Exhibit J to Commonwealth's Opposition (photograph of gun admitted at defendants' trial showing that serial number matches serial number of .40 caliber pistol stolen in New Hampshire in 1997); Trial Transcript, Volume V, at 208 (testimony describing .40 caliber pistol recovered in

Cremone's parking lot with serial number 2W5NB59548); Trial Exhibit 8 (.40 caliber pistol).)

While, on its surface, the Montana Report appears to contain exculpatory evidence that implicates a third party in the shooting and calls into question a key witness's credibility, see Watkins, 473 Mass. at 231, the further investigation that this report spawned only served to invalidate such inferences. Not only did Silverman flatly disclaim the hearsay statement Montana attributed to him, but new evidence provided a materially stronger case against the defendants. 9, 10

3. ATF Report

Neither the redacted nor the unredacted version of the ATF Report constitutes exculpatory evidence. First, the redacted portion of the ATF Report, which the Commonwealth had turned over to the defendants prior to trial, implicates the defendants in the victim's murder by expressly naming them as shooters. (See Exhibit J to Defendants' Motion.) Second, the

⁹Just as with the Orlando Reports, it is doubtful that the Montana Report would be admissible at trial. In addition to having "a rational tendency to prove the issue the defense raises" and to being neither too remote nor too speculative, there must be "other substantial connecting links' between the proffered third-party culprit and the crime." Watkins, 473 Mass. at 234. There are no such links in the present case.

¹⁰In a separate motion, the defendants have moved to strike Silverman's and Furtado's affidavits, arguing that they are irrelevant to the question of whether the defendants are entitled to a new trial. As the Commonwealth points out, however, the motion judge "has the flexibility... to consider in the interest of justice all evidence that might bear on the issues presented." Grace, 397 Mass. at 312. The Court, upon reflection, exercises that discretion here with respect to Silverman and Furtado's affidavits.

That being said, however, the Court's consideration of these affidavits in the context of evaluating the exculpatory quality of the Montana Report is ultimately of no consequence. Even if the Court were to strike Silverman and Furtado's affidavits and conclude that, as third-party culprit evidence, the Montana Report constitutes admissible exculpatory evidence, the defendants have failed to demonstrate not only that the Commonwealth suppressed the Montana Report, as discussed above, but also that the defendants were prejudiced by not having the Montana Report at the time of their trial or their first new trial motion. See infra.

unredacted portion of the ATF Report relates to information dating back to 1995 that Porreca provided to ATF agents concerning his involvement with Johnnie and Paul Decologero. (See Exhibit U to Defendants' Motion.) This information does not "furnish[] corroboration of the [defendants'] story, call[] into question a material, though not indispensable element of the prosecution's version of the events, or challenge[] the credibility of a key prosecution witness." Watkins, 473 Mass. at 231.

D. Prejudice

"Even if [the Court] were to err on the side of caution and assume without deciding that the prosecution did not deliver [any of this evidence] . . . to the defendant[s] and that those . . . [pieces of evidence] were exculpatory," Vaughn, 471 Mass. at 408, the defendants would still not be entitled to a new trial because they have failed to demonstrate that the Commonwealth's alleged failure to disclose these pieces of evidence prejudiced them. Id. at 404. "To obtain a new trial when exculpatory evidence has been withheld, a defendant 'must establish prejudice.'" Id. The applicable standard for prejudice depends on the manner in which the defendant phrased his discovery request. See id. "Where a defendant requested specific exculpatory evidence prior to trial, the defendant must demonstrate only the existence of a substantial basis for claiming prejudice." Id. (emphasis added). This standard "is 'more favorable to the defendant' than if the request had been general" Commonwealth v. Daniels, 445 Mass. 392, 404 (2005) (emphasis added). "Where, on the other hand, a defendant's pretrial motion was merely a general request for exculpatory evidence, the defendant must show that the withheld evidence 'would probably have been a real factor in the jury's deliberations." Watkins, 473 Mass. at 231 (emphasis added); see also Murray, 461 Mass. at 20-21 (noting that standard of prejudice for

general request "is the same standard used to assess the impact of newly discovered evidence");

Commonwealth v. Tucceri, 412 Mass. 401, 413 (1992) (noting that standard of prejudice for general request "is substantially the same as the [Commonwealth v. Saferian, 366 Mass. 89, 96 (1974),] ineffective assistance of counsel standard").

1. General Request for Discovery

As noted, where the defendant has made a general request for discovery, the Court must determine whether the jury would likely have reached a different conclusion if the undisclosed evidence had been admitted at trial. Murray, 461 Mass. at 20-21. In the present case, the defendants made general requests for "any and all exculpatory material" in the Commonwealth's possession. (See Exhibit D to Defendants' Motion.) The Orlando Reports and the Montana Report fall within these requests. The question presented, then, is whether the defendants have demonstrated that the jury would probably have reached a different conclusion had such evidence been admitted at trial.

a. Orlando Reports

The Commonwealth points out that there was evidence at trial (and at the hearing on the defendants' first new trial motion) to the effect that Angelesco and Giangrande were involved in the victim's murder, and that the Commonwealth itself had maintained that Giangrande was so involved. (See, e.g., Trial Transcript, Volume XIII, at 58, 61 (argument in Commonwealth's closing that "[e]very single piece of evidence . . . tells you two guys, two shooters, Anthony Barry, Brian Cahill. No evidence of anybody else," and that "Gene Giangrande had Anthony Barry and Brian Cahill execute this kid. On April 16th, 1999, Anthony Barry was Gene

Giangrande's muscle").)¹¹ Leaving aside the inadmissibility of these reports, see ante, the defendants have not demonstrated either that the jury or the first motion judge "would have reached a different conclusion if the [Orlando Reports] had been admitted at trial." See Murray, 461 Mass. at 21 (citation omitted); see also Tucceri, 412 Mass. at 414 ("If the undisclosed evidence is cumulative... the failure to disclose that evidence does not warrant the granting of a new trial."); cf. Commonwealth v. Lessieur, 472 Mass. 317, 331-32 (2015) (holding that there was no "substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial" where newly discovered evidence "was largely cumulative" of evidence at trial).

As the Orlando Reports did not exist at the time of the defendants' trial in 2000, the defendants argue that, had the Commonwealth disclosed the reports earlier, this Court would have reached a different conclusion in its August 2003 Decision. Not true. Once again, evidence of Angelesco's and Giangrande's alleged involvement in the victim's murder was front and center before the Court on the defendants' first motion for a new trial. (See, e.g., August 2003 Decision, at 26-27 (summarizing evidence presented in support of first new trial motion regarding Giangrande's and/or Angelesco's possible involvement in victim's murder, including testimony from Donald Bonner that Giangrande carried out the murder, as well as testimony from James Sheehan that Angelesco and Giangrande committed the murder, and acknowledging that "[t]he evidence at trial gave rise to a reasonable inference that Giangrande could well have been involved in the murder in one way or another" (emphasis added)).) Accordingly, the defendants

¹¹As the Commonwealth pointed out at the hearing on this motion, the contention that Giangrande had shot the victim was fully before the jury, the prosecutor having referenced Giangrande by name some 40 times in his closing argument.

have not demonstrated that the motion judge would or would likely have reached a different decision on their first motion for a new trial if she had had the benefit of the Orlando Reports.

The evidence was clearly cumulative. See Vaughn, 471 Mass. at 404.¹²

b. Montana Report

The defendants cannot meet their burden with respect to this evidence as well. First, the defendants have not demonstrated that the jury would likely have reached a different conclusion had an isolated mention of Robert Rennell as a possible shooter been admitted at trial. See, e.g., Commonwealth v. Brown, 57 Mass. App. Ct. 852, 859 (2003) ("[I]t borders on the fanciful to maintain that, on the basis of the undisclosed report, the jury would have disbelieved the police officers' essential account, buttressed by physical evidence, in favor of [defendant's] version of events."). Second, the defendants emphatically emphasized Porreca's lack of credibility at trial, see August 2003 Decision, at 17 & nn.23-24; so the statement concerning Porreca's alleged demand for \$100,000 to change his story would have been cumulative of other evidence that reached the jury. See Tucceri, 412 Mass. at 414 (holding that undisclosed evidence that is cumulative "does not warrant the granting of a new trial"). Finally, it is unlikely that the Montana Report's hearsay would have been admissible at trial. See Commonwealth v. Jones, 472 Mass. 707, 714 (2015) (holding that "statements to police officers are 'testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary

¹²Even under the more generous standard that applies to specific requests, the defendants have not demonstrated that they have a substantial basis for claiming that the Commonwealth's failure to disclose the Orlando Reports prejudiced them, either at trial or at the post-trial stage.

¹³Even under the more generous standard that applies to specific requests, the defendants have not demonstrated that they have a substantial basis for claiming that the Commonwealth's failure to disclose the Montana Reports prejudiced them.

purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution" (quoting <u>Davis</u> v. <u>Washington</u>, 547 U.S. 813, 822 (2006));

<u>Commonwealth</u> v. <u>Dovle</u>, 83 Mass. App. Ct. 384, 389 (2013), <u>aff'd</u>, 472 Mass. 1002 (2015)

(holding that "the hearsay rule forbids . . . the testimonial use of reported statements" (alteration in original) (citations omitted)); <u>see also Watkins</u>, 473 Mass. at 234 (holding that, to be admissible, third-party culprit evidence cannot be "too remote nor too speculative," it must have "a rational tendency to prove the issue the defense raises" and there must be "'other substantial connecting links' between the proffered third-party culprit and the crime").

2. Specific Request for Discovery

The defendants are entitled to review under a more favorable standard "[w]hen the Commonwealth withholds evidence that has been *specifically* requested" <u>Daniels</u>, 445 Mass. at 404 (emphasis in original). In such circumstances, the defendants "must demonstrate only the existence of a substantial basis for claiming prejudice." <u>Watkins</u>, 473 Mass. at 231. Here, prior to trial, the defendants made a specific request "for exculpatory information in the nature of promises, inducements, rewards or threats" that Porreca received, including:

- "1. what crime he was summonsed to the federal Grand Jury to testify about;
- 2. whether he was a suspect in the crime or a witness only;
- 3. what agency of the federal government is in charge of matters concerning Brian Porreca;
- 4. which Assistant United States Attorney is in charge of the Grand Jury investigation;
- 5. the nature of all rewards received from the United States by Brian Porreca since the date of this homicide:

- 6. what promises have been made to him by agents, assistants, or anyone acting on behalf of the United States;
- 7. what inducements, favorable or unfavorable have been made to him and by whom."

(Exhibit D to Defendants' Motion.) The Court (White, J.) allowed that request and, thereafter, the Commonwealth provided the defendants with, *inter alia*, a redacted copy of the January, 2000 ATF Report. (See Exhibits J and S to Defendants' Motion.)

The defendants were thus in possession of the redacted ATF Report at the time of their trial. They argue now that the Commonwealth's failure to turn over the unredacted copy of the ATF Report precluded them from raising an "other suspects" defense, i.e., that Johnnie Decologero wanted to kill Porreca and not the victim, thereby supplying a motive for someone other than the defendants to shoot Porreca. A review of the unredacted portion of the report, however, reveals that it does not concern the defendants' case. Although the ATF Report states that Porreca owed Johnnie Decologero \$8,000-\$10,000 for ten pounds of marijuana, and that Decologero was at Cremone's on the night of the shootings and spoke with Porreca, the report further states that Decologero was not present at the time of the shootings, having left the bar one hour earlier. Porreca's alleged debt to Johnnie Decologero at the time of the shootings, and Decologero's presence at Cremone's at some point prior to the shootings, therefore, does not create a substantial basis for claiming that the defendants were prejudiced by the Commonwealth's failure to turn over an unredacted copy of the ATF Report.

Accordingly, the defendants have not demonstrated that they have a substantial basis for claiming prejudice resulting from the Commonwealth's failure to turn over the unredacted version of the ATF Report, where the substance of the report itself carries no connection to their

case. See Tucceri, 412 Mass. at 414 ("If the undisclosed evidence . . ., in an over-all assessment, . . . does not carry a measure of strength in support of the defendant, the failure to disclose that evidence does not warrant the granting of a new trial."); see also Watkins, 473 Mass. at 231-32 (holding that defendant did not demonstrate "the existence of a substantial basis for claiming prejudice" where nondisclosed evidence "would have served only as weak and cumulative impeachment evidence"). 14

For all the foregoing reasons, the defendants' motion for a new trial on the grounds that the Commonwealth violated Brady shall be **DENIED**. 15. 16

16The defendants' attempt to analogize the distinctive situation presented in Wearry v. Cain, 136 S. Ct. 1002 (2016), to their own Brady argument lacks force. In Wearry, the prosecution's star witness, Sam Scott ("Scott"), testified at trial that the defendant, along with Randy Hutchinson and others, had killed the victim by running him over after Hutchinson had "pulled the victim out of his car, shoved him into the cargo space, and crawled into the cargo space himself." Id. at 1003, 1005. Another witness for the prosecution, Eric Brown, testified that he had seen the defendant with the victim. Id. at 1003. Therefore, "the only evidence directly tying [the defendant] to that crime was Scott's dubious testimony, corroborated by the similarly suspect testimony of Brown." Id. at 1006.

Moving for a new trial, the defendant argued "that three categories of belatedly revealed information would have undermined the prosecution and materially aided [his] defense." <u>Id.</u> at 1004. A plurality of the Supreme Court agreed, holding that "[b]eyond doubt, the newly revealed evidence suffice[d] to undermine confidence in [the] defendant's conviction." <u>Id.</u> at 1006. "First, previously undisclosed police records showed that" Scott had implicated the defendant in the crime because the defendant had betrayed him, and that Scott had told Brown

¹⁴Even assuming that the less favorable prejudice standard applied, the defendants have not demonstrated that the unredacted portion of the ATF Report "would probably have been a real factor in the jury's deliberations." See Watkins, 473 Mass. at 231.

¹⁵The defendants also argue that, given the existence of this confidential informant, the Commonwealth knew that Porreca's assertion that he saw the defendants shoot the victim was false. This argument fails, not only because the trial prosecutors attest that they did not see the subject reports until 2015 (see Exhibit R to Commonwealth's Opposition, pars. 3-4; Exhibit T to Commonwealth's Opposition, pars. 4-8), but also, and more significantly, because the reports containing the confidential informant's statements were not even created until *after* the defendants' trial. The defendants' motion must be denied on this basis as well.

IV. Newly Discovered Evidence

The defendants point to six items of newly discovered evidence that, they claim, would have played an important role in the jury's deliberations and materially impacted their verdict:

(1) the Orlando Report sent to defense counsel in March of 2008; (2) evidence relating to Porreca's drug use; (3) John Whitson's affidavit; (4) Brittany Cahill's affidavit; (5) evidence that Angelesco murdered another person; and (6) evidence of intimidation of witnesses whom the defendants intended to call at the hearing on their first new trial motion. These items of evidence

what to say about the defendant because "lying about having witnessed the murder would help him get out of jail." <u>Id.</u> at 1004. "Second, the [prosecution] had failed to disclose that, contrary to the prosecution's assertions at trial, Brown had twice sought a deal to reduce his existing sentence in exchange for testifying against" the defendant. <u>Id.</u> "Third, the prosecution had failed to turn over medical records on" Hutchinson that "revealed that, nine days before the murder, Hutchinson had undergone knee surgery" that would have precluded him from engaging in any of the "running, bending, or lifting" that the prosecution had attributed to him. <u>Id.</u> at 1005.

Unlike the evidence in the present case, the evidence in <u>Wearry</u> called into serious question the prosecution's "house of cards, built on the jury crediting Scott's account rather than [the defendant's] alibi." <u>Id.</u> at 1006. Although Scott admitted at trial that he had changed his account of the crime "several times[,]" <u>id.</u> at 1003, his credibility "would have been further diminished had the jury learned that Hutchinson may have been physically incapable of performing the role Scott ascribed to him, that Scott had coached another [witness] to lie about the murder and thereby enhance his chances to get out of jail, or that Scott may have implicated [the defendant] to settle a personal score." <u>Id.</u> at 1006-07. As for the evidence that Brown had sought a deal in exchange for his testimony at trial, "any juror who found Scott more credible in light of Brown's testimony might have thought differently had she learned that Brown may have been motivated to come forward not by his sister's relationship with the victim's sister – as the prosecution had insisted in its closing argument – but by the possibility of a reduced sentence on an existing conviction." <u>Id.</u> at 1007. In these exceptional circumstances, the withholding of such evidence was found to have violated the defendant's due process rights and entitled him to a new trial. <u>Id.</u> at 1008.

In the case at bar, by contrast, and as discussed below, the defendants cannot meet the Brady standard. This is not only because the allegedly withheld evidence was not in the Commonwealth's possession, but equally because the evidence is either inculpatory, immaterial, or cumulative of evidence known at trial and at the time of the defendants' first new trial motion. As such, the evidence would not have been a real factor in the jury's deliberations. Wearry is thus plainly distinguishable, and furnishes no authority for granting the new trial relief defendants seek.

shall be addressed in turn.

Where a defendant seeks a new trial on the basis of newly available or newly discovered evidence, the defendant "must establish both [1] that the evidence is newly discovered and [2] that it casts real doubt on the justice of the conviction." Commonwealth v. Rosario, 460 Mass. 181, 195 (2011), quoting Grace, 397 Mass. at 307. Regarding the first prong, "[e]vidence is considered "newly discovered" . . . only if it was unknown and unavailable at the time of trial despite the diligence of the moving party." Commonwealth v. Kobrin, 72 Mass. App. Ct. 589, 612-13 (2008). "[E]vidence does not meet the test for 'newly discovered' evidence [if] it was available prior to the trial." Commonwealth v. Shuman, 445 Mass. 268, 272 (2005).

The defendant satisfies the second prong if he can demonstrate that there is "a substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial." Commonwealth v. Sena, 441 Mass. 822, 830 (2004) (citation omitted); Commonwealth v. Figueroa, 422 Mass. 72, 79 (1996) (same). "The task of the motion judge is to decide whether the new evidence probably would have been a real factor in the jury's deliberations, and in that regard the judge must consider the strength of the case against the defendant." Lykus, 451 Mass. at 326; Grace, 397 Mass. at 306 (same). A strong case against the defendant "may weaken the effect of evidence which is admittedly newly" available, and new evidence "that is cumulative of evidence admitted at the trial tends to carry less weight than new evidence that is different in kind." Grace, 397 Mass. at 305-06. Finally, the newly discovered evidence must be material, credible, and admissible. Commonwealth v. Wright, 469 Mass. 447, 462 (2014); Grace. 397 Mass. at 305 (same).

A. Orlando Report

On March 15, 2008, defense counsel received a police report from an anonymous source.

The cover letter accompanying it stated:

"It is with disappointment and regret that I write this letter. I work in the Middlesex District Attorney's Office and it has come to my attention that there is evidence important to your clients, yet undisclosed.

"Inquiries to my superiors regarding this issue have gone unanswered as have questions posed relating to the guilt of [the defendants]. With limited honorable alternatives, I attach one of the documents that you will find interesting.

"I hope it helps.

"cc: Gerald [sic¹⁷] T. Leone, Esq.
Office of the District Attorney
40 Thorndike Street
Cambridge, MA 02141[.]"

(Exhibit B to Defendants' Motion.) The Massachusetts State Police report that was included with the letter is dated July 26, 2001, and identifies the "Reporting Officer" as Nunzio Oriando ("Orlando") (the "July 26th Report"). The majority of the two-page July 26th Report is redacted. The unredacted portion states as follows:

"The CI [confidential informant] stated that William 'Billy' Angelesco is a made member of the Boston LCN. Angelesco was sponsored by Carmen DiNunzio, and is a soldier in his crew. The CI stated that Angelesco 'got straightened out' because he shot and killed 'Mucka' McCormack in Malden. Angelesco is presently running a gaming office in Revere utilizing telephone number 781-284-0505. The CI told us that Angelesco, Greg Costa, and a subject known only as 'Johnny Drapp' from Medford, were all recently at the Foxy Lady strip club in Rhode Island. While at the strip club Angelesco and his cohorts got into a dispute

¹⁷As of the date of the letter, the Middlesex County District Attorney was *Gerard* T. Leone, Jr. As the Commonwealth points out, this error casts doubt on the representation that the unsigned letter in fact came from an employee in the Middlesex County DA's office (who would presumably know the correct spelling of the District Attorney's name). See Grace, 397 Mass. at 305 (requiring that newly discovered evidence be credible).

with the bouncers, which ultimately led to fisticuffs. A subject known only as 'Peter' got involved with the dispute. 'Peter' allegedly works in the club and is affiliated with the local LCN. The CI said Angelesco attempted to calm matters down by telling 'Peter' 'we're with the same people'. Once the fight was over and Angelesco and his friends were thrown out, 'Peter' contacted members of the Rhode Island LCN and advised them that Angelesco had been 'throwing names around'. According to the CI, Angelesco denies throwing any names around, and stated that 'Peter' made up his own version of what really happened. The CI also informed us that Angelesco has been spending a lot of time with Cono Frizzi."

<u>Id.</u> (emphasis added).

The July 26th Report, created in 2001, did not exist at the time of the defendants' trial, which took place in April of 2000. The focus, then, must be on the defendants' first new trial motion. The Court "assume[s] without deciding that the newly discovered evidence proffered by the defendant[s] was actually newly discovered." Wright, 469 Mass. at 461. The question to be answered, therefore, is whether the July 26th Report creates a substantial risk that the first motion judge would have reached a different conclusion had this evidence been available to her and admitted. Id. at 461-62. In making this determination, the Court must consider the overall strength of the case against the defendant, Lykus, 451 Mass. at 326; Kobrin, 72 Mass. App. Ct. at 613, and must likewise keep in mind that if the new evidence is cumulative of admitted evidence, it "carr[ies] less weight than new evidence that is different in kind." Grace, 397 Mass. at 305-06.

At the hearing on the defendants' first new trial motion, Angelesco invoked his rights under the Fifth Amendment and did not testify. (New Trial Hearing Transcript (March 20, 2003), at 190-91.) In place of such direct evidence, the motion judge heard testimony from James Sheehan ("Sheehan") that Angelesco had told him that he and Giangrande were the shooters, and that Angelesco himself had shot the victim. (New Trial Hearing Transcript (March 20, 2003), at 211-12; see also August 2003 Decision, at 27.) Sheehan additionally testified that

Giangrande had identified himself as one of the shooters, and that Giangrande said that he and Angelesco "were in it together" (referring to the April 17th shootings). (New Trial Hearing Transcript (March 20, 2003), at 199-203, 213.) The motion judge, however, did not credit any of Sheehan's testimony (August 2003 Decision, at 27.)

Donald Bonner ("Bonner") likewise testified at the evidentiary hearing that, a few months before the defendants' trial, Giangrande told him that he and Angelesco shot the victim. (New Trial Hearing Transcript (March 20, 2003), at 119-20.) Bonner further testified that he told Giangrande that he had "'heard it on the street'" that Giangrande and Angelesco had been involved in the shooting. (New Trial Hearing Transcript (March 20, 2003), at 120.) Once again, however, the motion judge did not credit Bonner's testimony, reasoning that, "even if Giangrande was concerned about Barry and said that he, Giangrande, did the murder, that does not exclude the guilt of Barry and Cahill in the murder as well. The evidence at trial gave rise to a reasonable inference that Giangrande could well have been involved in the murder in one way or another." (August 2003 Decision, at 26-27.)

While the motion judge thus heard live, substantive evidence¹⁸ that Angelesco was one of the shooters, she expressly rejected Sheehan's and Bonner's testimony as lacking credibility.¹⁹ In

¹⁸The defendants assert that they also submitted an affidavit from Kenneth Nestor ("Nestor") in support of their first new trial motion. (Defendants' Motion, at 68.) According to the defendants, Nestor stated in his affidavit that, "[i]n the days following the hearing, Nestor overheard a telephone conversation between Porreca and Gene Giangrande where Porreca stated that he knew Giangrande was one of the shooters because he saw his 'goofy' run." <u>Id.</u> The defendants have not submitted this or any other affidavit from Nestor in support of their second new trial motion currently before the Court.

¹⁹The defendants point out that Sheehan testified for the prosecution at Angelesco's own trial in 2005, discussed further below, and argue that "[i]f Sheehan was credible enough to testify for the Commonwealth in a first-degree murder case, it seems dubious that he would not be

these circumstances, the defendants cannot demonstrate that, if the motion judge had had the benefit of the July 26th Report, she would have come to a different conclusion. Compare Buck, 64 Mass. App. Ct. at 765 (concluding that entire day of surveillance video from bar was newly discovered evidence entitling defendant to new trial where, at time of trial, defendant only had portion showing defendant at bar plus bar manager's testimony that video time code was one hour off; possession of entire tape would have enabled defendant to challenge time-code

credible enough to grant his testimony some weight when he testified in support of [the defendants'] case." (Defendants' Motion, at 23.) At the August 2016 hearing on the present motion, defense counsel relied on Commonwealth v. Keo, 467 Mass. 25 (2014), to support the defendants' argument that the Commonwealth cannot take such inconsistent positions in different trials. Keo, however, is distinguishable from the case at bar. In Keo, the Supreme Judicial Court discussed the practice in some courts of finding "that the use of inherently factually contradictory theories against different defendants for the same crime violates the principles of due process." Id. at 36, and cases cited. "For a due process violation to occur, 'an inconsistency must exist at the core of the prosecutor's case against defendants for the same crime." Id. (citation omitted). There must be "a fundamental change in its version of the facts between trials" that "typically involves the use of evidence at the different trials which was 'factually inconsistent and irreconcilable.'" Id. (citations omitted). "Due process violations have also resulted when a prosecutor's 'pursuit of fundamentally inconsistent theories in separate trials against separate defendants changed with the same murder [involves a situation where a prosecutor] knowingly uses false evidence or acts in bad faith." Id. at 37 (alteration in original) (citation omitted).

Here, the defendants contend that the Suffolk County prosecutor's having deemed Sheehan credible enough to testify in Angelesco's 2005 trial is inconsistent with the Middlesex County prosecutor's taking the position in the defendants' unrelated 2000 trial that Sheehan is not credible. Such alleged inconsistency does not fall within the category of cases that Keo identifies as raising a due process concern, thus this argument fails. Cf. id. at 37 (stating that courts reject due process challenges "where it cannot be determined which of the two defendants was the shooter and where either defendant could have been convicted as a principal or as an aider and abettor, accomplice, or joint venturer," and concluding that "any inconsistency" in those circumstances "is 'immaterial' to the conviction"). The Court further notes that Angelesco was acquitted at his 2005 trial, see infra, suggesting that that jury did not find Sheehan credible either.

²⁰This same reasoning applies to the evidence discussed in the context of the defendants' Brady argument.

testimony and thereby bolster his alibi defense).

In order "[t]o determine whether there is a substantial risk that [the motion judge] would have reached a different conclusion had the newly discovered evidence been admitted[,]" the Court must first "decide . . . whether [such evidence] is admissible." Wright, 469 Mass. at 462. The confidential informant's statement contained within the July 26th Report is undeniably hearsay. See Jones, 472 Mass. at 714 ("[S]tatements to police officers are 'testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution[.]" (citation omitted)); Dovle, 83 Mass. App. Ct. at 389, aff'd, 472 Mass. 1002 (2015) ("[T]he hearsay rule forbids . . . the testimonial use of reported statements" (alteration in original) (citations omitted)). "[W]here third-party culprit evidence is hearsay that does not fall within a hearsay exception, it is admissible, in the judge's discretion, only if it is otherwise relevant and will not tend to prejudice or confuse the jury, and if there are "other substantial connecting links" between the proffered third-party culprit and the crime." Watkins, 473 Mass. at 234; accord Commonwealth v. Lovez, 433 Mass. 406, 416 (2001) ("Merely introducing another possible suspect, without substantial admissible evidence that this person, and not the defendant, may have committed the crimes, does not warrant a new trial.").

In the case at bar, there are "no substantial connecting links" – including Sheehan's and Bonner's testimony, even assuming the motion judge had credited it – because the confidential informant's information consists entirely of unattributed "word on the street" rumor.²¹ (See

²¹The defendants previously filed a post-trial motion for discovery seeking "any and all photographs, reports or documents relating to the fingerprint/palm print testing performed on Trial Exhibit 7, an Uzi weapon, digital color images of any photographs of the latent

Exhibit S to Commonwealth's Opposition, pars. 8, 12.) See Bonnett, 472 Mass. at 849 (holding that, "standing alone, 'word on the street' carries no indicia of reliability[,]" especially where informant's statement does not "provide details that [go] beyond a threadbare rumor" and where there is no "showing that the 'word' came from a percipient witness" (citation and internal quotation marks omitted)). The July 26th Report, therefore, containing only uncorroborated rumor in a hearsay format, would not be admissible at trial. Id.; see also Commonwealth v. Martinez, 437 Mass. 84, 96-97 (2002) (holding that newly discovered evidence consisting of informant's statement that another individual confessed to murder for which defendant was convicted was "inadmissible hearsay. . . . for which the defendant has identified no exception that would permit admitting such evidence"); Lopez, 433 Mass. at 416 ("The usefulness of this [newly discovered] information is highly questionable[,]" because defendant's allegation that individual whom he claimed committed the crime for which defendant was convicted "threatened revenge against him is impermissible hearsay"); Commonwealth v. Rodriguez, 17 Mass. App. Ct.

fingerprint/palm print evidence and the object upon which such evidence was found/developed, and any and all information related to latent palm print or fingerprints found on this gun." In a decision dated January 12, 2016, the Court allowed that request, and ordered the Commonwealth to turn over all such information to the defendants and, to the extent that there was a matchable print on Trial Exhibit 7, the Court ordered the Commonwealth to provide the defendants with access to those prints for comparison. On May 18, 2016, the Commonwealth reported that the latent print in question ("Latent Print #18") was not identifiable.

In July, 2016, the defendants filed a motion seeking funds to engage a fingerprint expert and requesting that the Commonwealth turn over Angelesco's and Giangrande's palm prints, submitting in support of that motion an affidavit from a fingerprint expert who states that Latent Print #18 contains enough detail to enable him to exclude individuals from having left the print. The Commonwealth forwarded this motion to the State Crime Lab, which re-analyzed Latent Print #18 using technology that had not been available when the print was originally tested in 2000. This analysis revealed that one Brian Carter had left Latent Print #18; and Carter had previously been identified as having left another fingerprint on the same piece of evidence. By separate decision, this Court has denied the defendants' motion for further expert funds.

547, 554-55 (1984) (holding that defendant's argument that newly discovered evidence "would have cast the defendant's case in a wholly different light" was "weakened considerably because the proffered testimony was largely inadmissible").

For these reasons, discovery of Orlando's July 26th Report furnishes the defendants with no grounds for a new trial.

B. Porreca's Drug Use

The defendants next argue that newly discovered impeachment evidence relating to Porreca's drug use entitles them to a new trial. The Court does not agree. First, such evidence cannot be considered "newly discovered," as the jury at the defendants' trial heard testimony from Porreca himself about his substantial Percocet use. (See Trial Transcript, Volume VI, at 92-93 (Porreca testifying that he worked for Giangrande, who paid him in money or Percocets which he consumed himself); Trial Transcript, Volume VI, at 133 (Porreca testifying that he had consumed two or three Percocets on April 16, 1999); Trial Transcript, Volume VI, at 139 (Porreca testifying that he was no longer "under the effects" of the Percocets when he was at Cremone's on April 16th, but that, while there, he consumed four or five light beers).) Porreca's son likewise testified at trial that his father used narcotics and drank. (Trial Transcript, Volume X, at 194.)

Second, the defendants already raised the matter of Porreca's drug addiction in their first new trial motion, and this Court rejected the argument as cumulative in its August 2003

Decision. <u>Cf. Commonwealth v. Jackson</u>, 468 Mass. 1009, 1111 (2014) (rescript) (prohibiting defendant from raising "issue again in his third motion for a new trial" where Appeals Court already considered issue in defendant's direct appeal). "While a judge does have the discretion

to rehear such questions, [the Supreme Judicial Court] has recommended restricting the exercise of that power to 'those extraordinary cases where, upon sober reflection, it appears that a miscarriage of justice might otherwise result.' Commonwealth v. Watson, 409 Mass. 110, 112 (199!). The defendants have not made such a showing here, and will therefore be foreclosed from re-arguing the matter in their second new trial motion.

Finally, even if evidence concerning Porreca's drug use at the time of the shooting had some impeachment value, it would still not entitle the defendants to a new trial. "Newly discovered evidence that tends merely to impeach the credibility of a witness will not ordinarily be the basis of a new trial." Commonwealth v. Sleeper, 435 Mass. 581, 607 (2002) (citations omitted).²²

The defendants' argument that the Commonwealth violated their right to meaningful confrontation of witnesses by failing to turn over evidence concerning Porreca's drug use fails as well. In making this argument, the defendants point to medical records from Porreca's April 21, 1999 visit to Saints Memorial Medical Center, and to the March, 2003 affidavit of Dr. William A. Stuart ("Dr. Stuart"), the doctor who treated Porreca on April 21, 1999. As the Commonwealth correctly points out, "the right to confrontation 'does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony." Commonwealth v. Figueroa. 79 Mass. App. Ct. 389, 400 (2011), quoting Pennsylvania v. Ritchie, 480 U.S. 39, 53 (1987). Although the defendants suggest that Figueroa is not controlling authority, this is plainly not the case. See Adamowicz v. Ipswich, 395 Mass. 757, 759 n.4 (1985) ("It goes without saying that Appeals Court decisions may appropriately be cited as sources of Massachusetts law.' . . . 'An intermediate court . . . is a maker of law in the same sense as the supreme court." (second ellipses in original) (citation omitted)).

In all events, the evidence the defendants rely upon does not rise to the level of being "useful" to them in any way. The one-page "Triage/Nursing Record" from Saints Memorial Medical Center dated April 21, 1999 indicates that Porreca informed the hospital that he was "drug sick" when he arrived. (Exhibit N to Defendants' Motion.) Dr. Stuart reviewed the medical records relating to Porreca's visit to the hospital on April 21, 1999, at which time Porreca "request[ed] methadone" and Dr. Stuart refused to provide it to him. (Exhibit P to Defendants' Motion, pars. 2, 3.) Although Dr. Stuart maintains that he has "no independent memory of having treated Mr. Porreca," he understands from the medical records that, at the time, he "was not of the opinion, within a reasonable degree of medical certainty, that this patient

C. John Whitson's Affidavit

In an affidavit dated April 15, 2005, John Whitson ("Whitson") states that he was inside Cremone's on the night of the shooting. (Exhibit L to Defendants' Motion, par. 4.) The affidavit then recites:

"As word broke out that a shooting had occurred in the parking lot, [Whitson] made his way towards the back door of the restaurant and [he] ran into Brian Porreca — who had been shot — in the hallway between the restaurant and the back exit. Brian Porreca and [Whitson] exchanged words. During this exchange, Brian did not mention the names of [the defendants] to [Whitson] in any manner. Michael Barry [defendant Barry's brother] asked [Whitson] if he would be willing to sign an affidavit attesting to the fact that Brian Porreca never mentioned [the defendants'] names. [Whitson] said [he] would."

(Id.) Thereafter, at the Billerica House of Correction, Michael Barry again asked Whitson to sign an affidavit to the effect that Porreca did not name the defendants as his shooters, and Whitson "said that [he] would once [his] legal issues were settled." (Exhibit L to Defendants' Motion, par. 5.)

When Whitson was involved in a work release program in the Fall of 2002, he met Michael Nestor with whom he discussed the shooting at Cremone's. (Exhibit L to Defendants' Motion, par. 6.) At that time, Whitson "told Michael Nestor that Brian Porreca did not mention the names of [the defendants] the night of the shooting. [Whitson] told Michael Nestor – who . . . knew Michael Barry – to tell Michael Barry that [Whitson] was still willing to come forward

was actually suffering from heroin withdrawal." (Exhibit P to Defendants' Motion, par. 3.) Instead of prescribing methadone, therefore, Dr. Stuart administered "the Catapres patch to alleviate potential withdrawal signs and symptoms, if any, that [Porreca] might experience after discharge." (Id.) Pretrial non-disclosure of the records of Porreca's post-shooting hospital visit, therefore, did not violate the defendants' right to meaningful confrontation of witnesses. The jury heard substantial evidence of Porreca's drug use; and, at the very most, these medical records show that Porreca used drugs after the shooting. Such evidence does not logically support the contention that Porreca was under the influence of drugs at the time of the shooting.

and tell that truth." <u>Id.</u> At the time of the defendants' first new trial motion, Whitson "did not want to get involved that time so [he] did not testify[,]" despite knowing that Barry's attorney wanted him to do so. (Exhibit L to Defendants' Motion, par. 7.) The defendants argue that Whitson's affidavit rebuts Porreca's claim that he stated in Whitson's presence that the defendants had shot him. (<u>See</u> Trial Transcript, Volume VI, at 167.)

As a threshold matter, the defendants cannot meet their burden of establishing that this evidence "was not discoverable at the time of trial " Sena, 441 Mass. at 830. Although the defendants "need not jump quite so high a hurdle" as showing that it would have "been impossible for counsel to have uncovered the new evidence before trial[,]" Kobrin, 72 Mass. App. Ct. at 613, they must show that it was "not reasonably discoverable by them at the time of trial (or at the time of the presentation of an earlier motion for a new trial)." Grace, 397 Mass. at 306; see also Commonwealth v. Staines, 441 Mass. 521, 534 (2004) (holding that first prong "requires a showing that reasonable diligence would not have uncovered the evidence by the time of trial"). At trial, Porreca testified that, immediately after the shooting, he told Whitson that the defendants had shot him. (Trial Transcript, Volume VI, at 165, 167.) Barry's attorney objected to this testimony at sidebar, "based on the factual background of this statement. Whitson was interviewed by the grand jury and by police, and he had denied that this statement was made . . . by Porreca to him. Porreca testified in the grand jury and never mentioned this statement and then . . . [,] at the deposition hearing, he comes out with this statement. . . . [T]he credibility of the witness and this statement are at issue here . . . " (Trial Transcript, Volume VI, at 167; Trial Transcript, Volume VI, at 215 (Commonwealth's stipulation that Porreca did not testify before grand jury that he made this statement to Whitson).) The Court overruled this objection. (Trial

Transcript, Volume VI, at 167.)

Whitson's denial that Porreca had named the defendants as his shooters was, therefore, not unknown at the time of trial. See Kobrin, 72 Mass. App. Ct. at 612-13 (holding that evidence is newly discovered "only if it was known and unavailable at the time of trial despite the diligence of the moving party" (quotation marks and citations omitted)). Additionally, the defendants have not demonstrated that they used "due diligence" to secure Whitson's statement either at the time of their trial or at the time of the presentation of their first new trial motion. ²³

See Grace, 397 Mass. at 306 (placing burden on defendant to prove "that reasonable pretrial diligence would not have uncovered the evidence"). Whitson's affidavit, therefore, cannot be considered "newly discovered" evidence.

Even if the defendants could somehow satisfy the first prong of the newly discovered evidence standard, they cannot satisfy the second prong by demonstrating that there is a substantial risk that the jury would have reached a different conclusion had Whitson's denial statement been before them. This follows because the jury already heard evidence conflicting with Porreca's testimony. Stephen Almeida testified at the defendants' trial that he had been at Cremone's with Whitson on the night of the shooting. (Trial Transcript, Volume V, at 113, 116.) Almeida asserted that, after he and Whitson heard gunshots, Porreca walked into the restaurant and "just passed right by" Almeida. (Trial Transcript, Volume V, at 117.) Although Almeida did not affirmatively assert that Porreca did not speak to Whitson after the shooting, a jury could

²³As the Commonwealth points out, Whitson was on the defendants' witness lists for both their trial and the evidentiary hearing on their first new trial motion. (See Trial Transcript, Volume II, at 9 (listing potential trial witnesses for benefit of potential jurors); New Trial Hearing Transcript (April 16, 2003), at 13 (informing Court that defense had subpoenaed Whitson but that he had not yet appeared).)

reasonably draw this inference from Almeida's testimony. Thus, Whitson's testimony that Porreca did not identify the defendants as the shooters would have been cumulative of Almeida's testimony and, therefore, not supportive of a new trial. See Grace, 397 Mass. at 305-06 ("[N]ewly discovered evidence that is cumulative of evidence admitted at the trial tends to carry less weight than new evidence that is different in kind.").

D. Brittany Cahill's Affidavit

At the defendants' trial, Brittany Cahill ("Brittany"), defendant Cahill's half sister, was a witness for the Commonwealth. ²⁴ She was 14 years old at the time of the trial. (Exhibit M to Defendants' Motion (testimony), at 21-22.) Brittany testified that, the night before the shooting, Cahill told her that he was going out to eat with Barry; that, at some point after the shooting, Cahill asked her to buy him a newspaper, and then he laughed as he read an article about the shooting; that, a few days after the shooting, Cahill talked to himself as he and Brittany drove past Cremone's; that, on that same day, Brittany saw Cahill counting \$900, which he told her was from "[d]oing [his] business[;]" and that, a few weeks after he was arrested, Cahill told Brittany not to give the police any information. (Exhibit M to Defendants' Motion (testimony), at 25, 26-29, 32-33, 36, 37; see also August 2003 Decision, at 14-16 (quoting telephone conversation between Brittany and Cahill).) The defendants argue that this testimony corroborated Porreca's testimony that Barry and Cahill were the shooters. They also note that the Commonwealth highlighted Brittany's testimony in its closing argument. (See Trial Transcript, Volume XIII, at 61 (referencing Brittany's testimony about Cahill's reaction as he drove by Cremone's in the

²⁴Brittany offered testimony against defendant Cahill only, and the Court instructed the jury to that effect. (Exhibit M to Defendants' Motion, at 37-38.)

context of bolstering Porreca's credibility).)

In an affidavit dated January 15, 2009, Brittany, then age 23, recanted her testimony that Cahill laughed while reading the newspaper the day after the shooting, that Cahill talked to himself as they drove past Cremone's, and that Cahill told her that he had money from "doing [his] business." (Exhibit M to Defendants' Motion (affidavit), pars. 6-8.) Brittany did not come forward with this information during the defendants' first new trial motion, "because [she] wasn't a legal adult, [and she] was living with [her] mother . . . [who] never would have allowed it." (Exhibit M to Defendants' Motion (affidavit), par. 2.) Brittany alleges in this more recent affidavit that she "testified the way that [she] did because [she] was a young kid and wanted to do what [her] mother and Trooper [Robert] Manning wanted [her] to do. [Prosecutor] Gerard Butler was also very pushy and told [her] what to answer." (Exhibit M to Defendants' Motion (affidavit), par. 9.) Manning is further alleged to have scared and intimidated her, and he "told [her] that [she] had to testify against [Cahill] or else [she] would get in trouble. [She] was very voung at this time and completely believed him." (Exhibit M to Defendants' Motion (affidavit), pars. 3, 5.) The defendants argue that this affidavit represents newly discovered evidence that entitles them to a new trial.

For purposes of this motion, the Court assumes that Brittany's affidavit is newly discovered, as she was a minor at the time of the defendants' trial and their first new trial motion. In all events, however, the defendants cannot meet the second prong of the newly discovered evidence standard. First, Brittany's testimony was not substantively exculpatory, and did not form an essential underpinning of the convictions. Her testimony did not place the defendants at the scene of the shootings, but rather concerned Cahill's arguably suspicious behavior thereafter.

The strong countervailing evidence placing the defendants at the scene of the shooting, then, clearly weakens the force of Brittany's prospective testimony at a new trial that, presumably, would be to the effect that she did not observe Cahill behaving differently in the days after the shootings. See Grace, 397 Mass. at 306 ("The strength of the case against a criminal defendant ... may weaken the effect of evidence which is admittedly newly discovered."); Commonwealth v. Hampton, 88 Mass. App. Ct. 162, 170 (2015) ("In recantation cases, when the trial has otherwise been determined to be fair, considerations of finality are strong. ... 'If the rule were otherwise, the right of a new trial would depend on the vagaries and vacillations of witnesses rather than upon a soundly exercised discretion of the trial court." (citations omitted)); accord Commonwealth v. Robertson, 357 Mass. 559, 562-63 (1970) ("[W]ere the recantation [of the witness] to be accepted as true there is sufficient other evidence to uphold the convictions. ... [And] [w]ithout [his] testimony ... there was sufficient evidence before the jury to convict the defendant").

Second, in light of the directly incriminating evidence placing the defendants at the scene of the shooting, testimony that Cahill did not behave differently in front of his young sister in the days following the murder would probably not have been a meaningful factor in the jury's deliberations. See Lykus, 451 Mass. at 326 ("A defendant seeking a new trial on the ground of newly discovered evidence must show [in part] . . . that it casts real doubt on the justice of the conviction."); Kobrin, 72 Mass. App. Ct. at 613 ("The motion judge must be satisfied that the evidence 'would probably have been a real factor in the jury's deliberations." (quoting Grace, 397 Mass. at 306)); see also Commonwealth v. Santiago, 458 Mass. 405, 416 (2010) (affirming lower court's conclusion "that there was no 'substantial risk[]" . . . that a jury provided with

[recanting witness's] 'new' testimony would reach a different result").

Finally, "when the newly discovered evidence is an alleged recantation by a material [25] witness[,]' 'the duty of the trial judge is to give grave consideration to the credibility of the witness's new testimony." Commonwealth v. Domino, 465 Mass. 569, 582 (2013); see also Grace, 397 Mass. at 305 (holding that "evidence said to be new . . . must be . . . credible"). The Court here does not credit Brittany's affidavit. See Lopez, 426 Mass. at 663 (holding that "judge may decide a rule 30(b) motion based solely on affidavits" and "may discredit untrustworthy affidavits"). Significantly, while Brittany recanted certain statements from her testimony, she did not recant her statement that, a few weeks after his arrest, Cahill told her not to supply the police with any information. (See August 2003 Decision, at 14-16 (quoting telephone conversation between Brittany and Cahill).) Additionally, both Manning and the trial prosecutor, Gerard Butler, report in affidavits that they were aware that Brittany's family had pressured her not to testify at trial. (Exhibit Q to Commonwealth's Opposition, par. 4; Exhibit T to Commonwealth's Opposition, par. 9.) This fact casts further doubt upon the credibility of Brittany's recent recantation, and weakens the case for a new trial on this basis.

E. Evidence that Angelesco Murdered Another Person

In February, 2002, Angelesco was indicted in Suffolk Superior Court for one count of first-degree murder, and one count of possession of a dangerous weapon without a license (G.L. c. 269, § 10(a)) ("Angelesco's case"). According to the defendants, the crime out of which

²⁵The Court does not consider Brittany to have been a particularly material witness at the trial because, as noted, her testimony was not an essential component of the Commonwealth's case against the defendants.

²⁶Commonwealth v. Angelesco, SUCR2002-10154 (Suffolk Super. Ct.).

Angelesco's case arose was the murder of a man in Revere, Massachusetts; and the police charged that Angelesco had shot the man and left the gun at the scene. (Defendants' Motion, at 65.²⁷) The defendants point out that a gun was left at the scene of the shootings for which they were convicted in the present case, and thus argue that the fact that a gun was also left at the scene in Angelesco's case is relevant to their third-party culprit defense. Even if this evidence were newly discovered third-party culprit evidence, the defendants would still not be entitled to a new trial on such basis because the evidence is not admissible. See Wright, 469 Mass. at 462 ("To evaluate the newly discovered evidence, [the Court] determine[s] whether this additional evidence would be admissible").

After a ten-day trial in February, 2005 (before Gants, J.), a Suffolk County jury found Angelesco not guilty on both offenses. An acquittai "absolves a defendant of criminal responsibility" Commonwealth v. Bruneau, 472 Mass. 510, 517 (2015); see also Black's Law Dictionary 24 (7th ed. 1999) (defining "acquittal" as "legal certification, usu[ally] by jury verdict, that an accused person is not guilty of the charged offense" and defining "acquitted" as "[j]udicially discharged from an accusation; absolved").

As noted <u>ante</u>, "[a] defendant may introduce evidence that tends to show that another person committed the crime or had the motive, intent, and opportunity to commit it[.]" <u>Watkins</u>, 473 Mass. at 233 (citation omitted). To be admissible, however, the evidence "must have 'a rational tendency to prove the issue the defense raises" <u>Id.</u> at 234 (citation omitted). The issue the defendants have pressed here is the contention that the evidence that Angelesco left a

²⁷The defendants have not submitted any actual evidence in support of this description of the crime, but the Court accepts it as true for purposes of its decision.

gun at the scene of a Revere murder suggests that Angelesco left the gun at the scene of the shootings in the defendants' case as well. Given that Angelesco's case resulted in an acquittal, however, the evidence of the gun at the scene of the Revere murder does not support the defendants' position. See Bruneau 472 Mass. at 517 (holding that "acquittal absolves a defendant of criminal responsibility"); Black's Law Dictionary 24 (defining acquittal similarly). This evidence is thus not admissible, because it does not have "a rational tendency" to prove that Angelesco committed the murder of the victim in this case. See Watkins, 473 Mass. at 233 (holding that, to be admissible, "[t]he proffered evidence must have 'a rational tendency to prove the issue the defense raises'" (citation omitted)); see also Commonwealth v. Bright, 463 Mass. 421, 440 (2012) ("Evidence merely raising the speculative possibility that 'some third person or persons had a motive to kill the victim[]' simply does not qualify as evidence tending to show that the crime was committed by a third party.""). 28

F. Intimidation of Defendants' Witnesses

The final piece of newly discovered evidence that the defendants argue entitles them to a new trial is the State Police's interference with the defendants' first new trial motion by allegedly

²⁸Even if Angelesco had been convicted or, as the Commonwealth posits, if the defendants could prove that Angelesco actually committed the murder of which he was acquitted, the singular similarity existing between Angelesco's case and the present one (a left-behind firearm at the crime scene) would in all events be insufficient to support a third-party culprit defense. Leaving a gun at the site of a murder is hardly a distinctive signature. Compare Commonwealth v. Keizer, 377 Mass. 264, 267-68 (1979) (finding "alleged participation of [specifically named individual] . . . in both robberies" was distinctive enough to form "substantial connecting links between the offense charged and the subsequent crime when coupled with the other common factors[,]" such as both crimes "involved a crime of the same type, committed by similar methods in the same vicinity of Boston, by three males of similar description" using weapons that were similar "in terms of specific characteristics: . . . square-barrelled pistol and a sawed off shotgun concealed by a paper bag").

intimidating the defendants' witnesses. Specifically, the defendants point to search warrants and arrest warrants that the State Police issued in early March of 2003, just days before the evidentiary hearing on the defendants' first new trial motion began, for the witnesses the defendants intended to call at that hearing. (Exhibit Z to Defendants' Motion.) The individuals named in these warrants are Donald W. Bonner, John Scarpelli, Ralph Cardarelli, Salvatore R. Marino, and Mario Fosco. The warrants purported to be the result of a "lengthy investigation[,]" and asserted that the parties had been conspiring with one another since January of 2003. (Id.) The warrants referenced drug offenses on the part of all of the men, and additionally asserted firearms offenses against John Scarpelli and Salvatore Marino.

In their new trial motion, the defendants argue that the State Police specifically intimidated Brian Tivnan, Donald Bonner, and Kenneth Nestor so that they would not testify for them at trial. (Defendants' Motion, at 68.) This argument is meritless. First, as the Commonwealth points out, Donald Bonner *did* testify at the hearing on defendants' first new trial motion, and the Court did not credit his testimony that Giangrande had confessed to the murder. (See August 2003 Decision, at 26; see also August 2003 Decision at 32 (noting that Kenneth Nestor did not testify); id. (noting that Brian Tivnan "came to the hearing on the motion for a new trial to testify, but when faced with the prospect of the prosecutor actually exploring the veracity of the claims contained in his affidavit, Tivnan asserted his Fifth Amendment rights

²⁹Donald Bonner's and Salvatore Marino's warrants did not contain this specific assertion, but the warrants do state that the two men had been involved in conspiracies since January of 2003.

³⁰The warrants the defendants have submitted in support of their motion do not include warrants for Brian Tivnan and Kenneth Nestor. For purposes of this decision, however, the Court presumes that warrants issued for these individuals as well.

against self-incrimination").)

Second, although the warrants did issue in the same month that the hearing on the defendants' new trial motion began, such warrants were the result of a "lengthy investigation" that the defendants have not demonstrated was conducted solely to intimidate Brian Tivnan and Kenneth Nestor against testifying on the defendants' behalf. Moreover, and leaving aside the merits of this assertion, the defendants have not demonstrated that the testimony of Brian Tivnan and Kenneth Nestor would likely have been a real factor in either the jury's deliberations or in the first new trial motion judge's decision. See Lykus, 451 Mass. at 326 ("The task of the motion judge is to decide whether the new evidence probably would have been a real factor in the jury's deliberations"); Kobrin, 72 Mass. App. Ct. at 613 (same).

The defendants' motion for a new trial on this basis must be denied as well.

G. Conclusion

The defendants' motion for a new trial on the basis of newly discovered evidence must be **DENTED**, as the defendants have not demonstrated that the evidence so discovered would have been a real factor in either the jury's deliberations or in the motion's judge's decision on their first new trial motion.

V. Bowden Defense

For the reasons explained <u>ante</u>, it is unlikely that the information contained within the Orlando Reports, including the July 26th report, or within the Montana Report would have been

³¹Conspicuously absent from the defendants' submissions are affidavits from these three individuals, or anyone else, attesting to this perceived intimidation. See, e.g., Commonwealth v. Lynch, 439 Mass. 532, 539 n.2 (2003), and cases cited (finding it "significant" that affidavit in support of defendant's new trial motion was not submitted).

admissible at trial as third-party culprit evidence. The defendants alternatively argue that this evidence would have been admissible in support of a Bowden defense, pursuant to which a defendant attempts to raise reasonable doubt by pointing out "[t]he failure of the authorities to conduct certain tests or produce certain evidence " Commonwealth v. Bowden, 379 Mass. 472, 486 (1980); see also Commonwealth v. Silva-Santiago, 453 Mass. 782, 800 (2009) (noting that the "[t]wo ways in which a defendant may seek to raise a reasonable doubt about his guilt" i.e., by third-party culprit evidence and by Bowden defense - "are sometimes offered simultaneously... but they are logically (and legally) distinct"). "[T]he inference that may be drawn from an inadequate police investigation is that the evidence at trial may be inadequate or unreliable because ... these tests or investigation [that the police failed to conduct] may have led to significant evidence of the defendant's guilt or innocence." Silva-Santiago, 453 Mass. at 801. "A jury may find a reasonable doubt if they conclude that the investigation was careless, incomplete, or so focused on the defendant that it ignored leads that may have suggested other culprits." Id. "[T]he failure of the police to investigate leads concerning another suspect is sufficient grounds for a Bowden defense." Id. at 802; accord Commonwealth v. Cassidy, 470 Mass. 201, 209 (2014) (holding that defendant may challenge "the adequacy of a police investigation [by using] information concerning third-party culprits to question whether the police took reasonable steps to investigate the crime" (alteration in original) (citation omitted)).

"Bowden evidence generally is 'offered not to show the truth of the matter asserted, but simply to show that the information was provided to the police." Commonwealth v. Scott, 470 Mass. 320, 330 (2014), quoting Silva-Santiago, 453 Mass. at 802. "Such evidence, therefore, is not subject to the limitations applicable to hearsay third-party culprit evidence." Id. "In order for

Bowden evidence to be admitted, . . . the judge must 'conduct a voir dire hearing to determine [!] whether the third-party culprit information had been furnished to the police, and [2] whether the probative weight of the Bowden evidence exceeded the risk of unfair prejudice to the Commonwealth from diverting the jury's attention to collateral matters." Id., quoting Silva-Santiago, 453 Mass. at 803. In the present case, the Court concludes that it is unlikely that the defendants would be able to satisfy either element of this standard at a voir dire hearing.

First, as established ante, and notwithstanding the fact that a meaningful investigation of the evidence could not have occurred because all three Orlando Reports were generated after the defendants' trial and the Montana Report was generated just one month before such trial, the police involved in the defendants' case were, in fact, not furnished this information. "Evidence is admissible to show inadequate police investigation . . . only if police learned of it during the course of their investigation." Cassidy, 470 Mass. at 210 (emphasis added) (citations omitted); see also Commonwealth v. Fitzpatrick, 463 Mass. 581, 597 (2012) (contrasting third-party culprit defense, "where evidence may be admitted regardless of whether the police knew of the suspect," with Bowden defense, where evidence may be admitted "only if the police had learned of it during the investigation and failed reasonably to act on the information" (emphasis in original) (quoting Silva-Santiago, 453 Mass. at 803)); cf. Murray, 461 Mass. at 19 (concluding that evidence within Commonwealth's control extends to evidence in hands of police officers involved "in the investigation and prosecution of the case").

Second, this evidence "[is] not probative of police thoroughness," see Commonwealth v. Alcantara, 471 Mass. 550, 562 (2015), because, after having been furnished with these reports, the Commonwealth did investigate the information contained therein. Specifically, the

Commonwealth obtained an affidavit from Orlando himself, who attests that the CI based his statement on "word on the street" rumor (see Exhibit S to Commonwealth's Opposition, pars. 8, 12.) This fact, in turn, militates against the argument that the police failed "to investigate leads concerning another suspect " Scott, 470 Mass. at 330, quoting Silva-Santiago, 453 Mass. at 802; see, e.g., id. at 331 (finding that "the shortfalls of the investigation suggested by the proffered evidence 'could [not] raise a reasonable doubt as to the defendant's guilt in the minds of the jurors" where, in part, "the information in the police reports was largely from unidentified origins, and much of it was vague"); cf. Bonnett, 472 Mass, at 849 ("[S]tanding alone, word on the street' carries no indicia of reliability" (citation and quotation marks omitted). Further, the Commonwealth's investigation into the information contained in the Montana Report ultimately yielded evidence that did not raise a reasonable doubt as to the defendants' guilt, see Scott, 470 Mass. at 330, but rather reinforced such guilt. See Silva-Santiago, 453 Mass. at 803 n.25 (noting that Bowden defense is "a two-edged sword for the defendant, because it opens the door for the Commonwealth to offer evidence explaining why the police did not follow the line of investigation suggested by the defense").

Accordingly, it is doubtful that either the three Orlando Reports or the Montana Report would have been admissible at trial to support a <u>Bowden</u> defense. Not only were the reports not in the police's possession during the investigation of the defendants' case, but the information contained both within these reports and adduced in the subsequent investigation thereof could not have led a reasonable jury to "conclude that the investigation was careless, incomplete, or so focused on the defendant[s] that it ignored leads that may have suggested other culprits." <u>Silva-Santiago</u>, 453 Mass. at 801.

VI. Testimony of DNA Expert

The defendants argue that Kevin McElfresh's ("McElfresh") trial testimony concerning DNA evidence from a hood violated their constitutional rights in two ways: (1) the defendants' confrontation rights are claimed to have been violated, because McElfresh did not actually conduct the DNA testing at issue; and (2) the defendants' due process and fair trial rights were purportedly violated, because McElfresh misrepresented the results of the DNA testing. As the defendants failed at trial to object to McElfresh's testimony or to the DNA evidence itself, the Court determines only whether the admission of this evidence created a substantial risk of a miscarriage of justice. Commonwealth v. Randolph, 438 Mass. 290, 294-95 (2002) (holding that substantial miscarriage of justice standard applies "where a defendant fails to preserve his claim for review"). 33

A. Confrontation Rights

"[U]nder Massachusetts law, an expert witness is not permitted to testify on direct examination to facts or data that another, nontestifying expert has generated, or to the nontestifying expert's own opinion, even though this information may be an important part of the basis of the testifying expert's opinion." Commonwealth v. Chappell, 473 Mass. 191, 202 (2015). Here, however, the record reflects that McElfresh testified to his own testing of the DNA

³²In a separate motion, the defendants requested funds for a DNA expert to test the hood, relying on these arguments from their new trial motion. As discussed below, these arguments fail, as the defendants are not able to demonstrate that new testing is likely to provide them with grounds for a new trial. The Court has denied the funds motion on this basis.

³³The same standard applies "when a defendant alleges that his failure to preserve an issue . . . stems from ineffective assistance of counsel. . . . [I]neffectiveness is presumed if the attorney's omission created a substantial risk, and disregarded if it did not." <u>Id.</u> at 295-96.

evidence.

At trial, McElfresh, Laboratory Director of The Bode Technology Group, Inc., testified that he received a portion of a hood and a sample of the defendants' blood on December 30, 1999. (Trial Transcript, Volume X, at 31, 33-34.) Based on the testing of this evidence, "the results were that the DNA sample from the hood cutting did not match the DNA of Mr. Barry but, in fact, the DNA from the hood cutting did match the DNA from Mr. Cahill." (Trial Transcript, Volume X, at 38.) Although he testified generally as to the procedures his laboratory employees use when they receive evidence such as the samples from this case, see Trial Transcript, Volume X, at 34-37, 39-41, 4 McElfresh testified that he himself "determine[d]... [that] the probability of a random individual having the same genetic profile as that of Mr. Cahill is one in one hundred and eighty-one billion." (Trial Transcript, Volume X, at 41; see also Exhibit W to Commonwealth's Opposition (January 2000 report signed by McElfresh concerning DNA testing of hood cutting).) McElfresh's opinion "to a reasonable degree of scientific certainty" was that "[t]he donor on the material on the hood cutting is that of Mr. Cahill." (Trial Transcript, Volume X, at 41-42.)

McElfresh's testimony and his report thus reflect that he was attesting to his own conclusions. There was no denial of confrontation rights, as McElfresh was not a "substitute" expert. See Chappell, 473 Mass. at 202 (holding expert witness may testify to "own opinions that she had formed independently and directly from the case review and analysis she herself had performed").

³⁴At the hearing on this motion, defense counsel pointed to McElfresh's use of "we" as support for the defendants' argument that McElfresh himself did not perform the testing.

B. The DNA Testing

The defendants alternately argue that the DNA testing itself is unreliable, because only eight (rather than thirteen) locations, or "loci," in the DNA were tested. McElfresh testified that "[t]ypically eight locations are tested, depending on the nature of the test. If it's paternity or other relationship testing, it could be up to 13 [loci]." (Trial Transcript, Volume X, at 22.) These locations:

"are chosen based on research that determined how different the DNA at these locations would be. . . . [W]hat we are looking at at these specific locations are different amounts of DNA. It turns out that the locations that have been chosen are very different between individuals and that difference is actually the amount of DNA between Point A and Point B. One individual may have a very little bit. Another individual may have quite a lot. It is actually because these fragments of DNA are repeated over and over again. And it turns out this is an excellent way to compare the variability between individuals because what we want to know when we are doing especially . . . an identification case, we want to be able to determine how – if there is no differences at that DNA, then we don't learn anything. If there are lots of differences at that DNA segment, then we can use those if they are the same to say, well, we have a good probability of this individual being the same thing.

. . . .

".... The DNA from any given tissue or sample would be the same at the locations that we have chosen to look at. That way, we can compare blood samples to muscle samples or bone samples for any other type of sample we might get.

. . . .

"[S]hort tandem repeats are actually the specific type of repeated DNA that we look at in this type of testing and in other types, as well. . . . [I]n forensic testing, we use these little repeated fragments of DNA; and they are specifically called short tandem repeats.

"[T]hese short tandem repeats [are] generally accepted in [the] scientific community as reliable locations at which to do DNA analysis[.]"

(Trial Transcript, Volume X, at 22-27.)

The defendants have not demonstrated that a substantial likelihood of a miscarriage of justice occurred because eight loci rather than thirteen were tested. Not only did McElfresh testify that the testing of eight loci was a generally accepted method within the scientific community, 35 he also testified that, based on having tested even just eight loci, "the probability of drawing at random a DNA pattern like that of Mr. Cahill's is one in one hundred and eighty-one billion." (Trial Transcript, Volume X, at 41.)

The defendants' argument that the DNA testing introduced at trial was unreliable; therefore, fails, and they shall not be entitled to a new trial on this basis.

VII. Courtroom Closure

A. Jury Pool

The trial judge, as was his practice, conducted a hardship inquiry of the jury venire outside the presence of the defendants and their counsel. He informed the defendants of this practice prior to the commencement of trial:

"Also, I do want to tell you this. I've done it before and I think it works out fairly. There is a judge who welcomes the jurors first thing in the morning here at the courthouse downstairs in the jury pool. I have been assigned to do that tomorrow morning. I will go down and welcome the entire venire, which may consist of 175 to 200 prospective jurors for this whole courthouse.

"After I welcome them, I then tell them that I have a trial that is going to go approximately three weeks. I do not tell them whether it's a civil case or a criminal case. Nothing is mentioned about that. But I tell them that I will listen downstairs, rather than transporting people up in elevators, to their excuses as to why it would be an undue hardship or unusual inconvenience to sit for three

³⁵It does not appear that the defendants challenged this evidence prior to trial through a motion pursuant to <u>Daubert v. Merrell Dow Pharms.</u>, Inc., 509 U.S. 579 (1993) and Commonwealth v. Lanigan, 419 Mass. 15 (1994).

weeks on a trial.

"I've found that I can do that in about an hour down there, and then the people that have trips planned or whatever, they have a legitimate excuse as to why they can't serve on a three-week jury, they are remaining so they can be shipped out to the other sessions. We well end up, hopefully, with about 100 prospective jurors that will come up to this courtroom; and then we will begin the impaneling process up here. I have eliminated having to go through all the excuses up here and then having to send them back down."

(Trial Transcript, Volume I, at 10-12.) The defendants did not object to this procedure; yet they argue now that they are entitled to a new trial because this practice violated their constitutional right to a public trial, their constitutional right to be present at all stages of their trial, and their constitutional right to counsel.

The Supreme Judicial Court addressed this very trial judge's practice in Commonwealth v. Barnoski, 418 Mass. 523 (1994). As he did in this case, "the trial judge [(Barton, J.)] excused a significant portion of the jury pool, for reasons of hardship, outside the presence of the defendant and his counsel, and without a stenographic record." Id. at 528. "Approximately three-quarters of the pool was interviewed. The interviews were not under oath, and no record of the excuses was made. The judge excused a large number of those interviewed; their excuses ranged from family and financial obligations to paid travel plans. Thirty-four potential jurors remained after this preliminary inquiry." Id. at 529. Unlike in the present case, upon learning that the judge had not kept notes of the potential jurors whom he had retained even though they had asked to be excused, defense counsel "objected on the ground that this information was necessary for the meaningful exercise of the defendant's peremptory challenges." Id. On appeal, the defendant made "two claims of error in regard to this procedure: it deprived him of his right to be present at all 'critical stages' of his trial," id., as "guaranteed by the Sixth and Fourteenth

Amendments to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights," id. at 528, "and it prevented him from exercising his peremptory challenges knowledgeably." Id. at 530.

The Court held that "[a] trial judge is allowed a broad range of discretion in the jury selection process[,]" and "conclude[d] that the judge did not abuse his discretion when he conducted the interviews prior to bringing the defendant to the bar." Id. Although "[a] defendant has a right to be present when jurors are being examined in order to aid his counsel in the selection of jurors and in the exercise of his peremptory challenges[,]" id. at 531 (citation omitted), the Court was "aware of no case that holds a defendant has a constitutional right to be present at preliminary hardship colloquies of members of the jury pool, prior to the individual, substantive, voir dire." Id. at 530-31. "The purely administrative determination whether a prospective juror was able to serve without undue hardship, for nearly one month . . . was not a 'critical stage." Id. at 531. The Court also held that "the defendant's ability to exercise his peremptory challenges was not compromised" because he "was present during the colloquies regarding potential jurors' qualifications; he was able to observe their demeanor, hear their responses to a variety of questions and evaluate their fitness to serve on the jury." Id.

Two years later, the Court addressed the issue of whether a trial judge had "interfered with the defendants' rights to a public trial when she excluded members of their families from the courtroom during the hardship colloquies." Commonwealth v. Gordon, 422 Mass. 816, 819 (1996). The Court held that "there is a critical distinction between hardship colloquies and individual examination of prospective jurors as to their qualifications to serve." Id. at 824.

Massachusetts courts "have never held, and [the Court] [was] aware of no case in which it has

been held, that the right to public trial extends to proceedings designed solely to enable the judge to hear prospective jurors concerning their requests to be excused from service and to dispose of such requests." <u>Id.</u> at 823. Therefore, "just as hardship colloquies need not be conducted in the presence of the defendant and defense counsel, they also need not be open to the public." <u>Id.</u> at 824.

The Supreme Judicial Court has thus made clear that the hardship inquiry of the venire does not constitute a critical stage of the proceedings at which the defendants, their counsel, and the public must be present. Consequently, the trial judge's practice of conducting the hardship inquiry of the venire outside the presence of the defendants, their counsel, and the public did not violate the defendants' constitutional right to be present, their constitutional right to counsel, or their constitutional right to a public trial. The defendants' motion for a new trial on this basis is, therefore, **DENIED**.

B. Jury Selection

The defendants next assert that their family members were excluded during jury selection, and that such courtroom closure violated their Sixth Amendment right to a public trial. The defendants rely on several pieces of evidence to support this contention. First, Barry's family members (Angela and Marie-Elena Barry), and Cahill's brother (Keith Cahill), submitted affidavits alleging that they were denied entry into the courtroom during jury selection for the defendants' trial. (Exhibits EE and FF to Defendants' Motion.) Angela and Marie-Elena Barry likewise state that "other people" were excluded from the courtroom at that time as well.

³⁶For this reason, the defendants' argument that Superior Court Rule 5 and G.L. c. 234A, §§ 39, 40 – which permit the Court to excuse a juror in a place other than in open court – are unconstitutional fails.

(Exhibit EE to Defendants' Motion, par. 5.) Second, Cahill's trial attorney submitted an affidavit in which he states that, while he was unaware that the courtroom was closed during jury selection,³⁷ and while he never informed Cahill of his right to a public trial, he understood "that it was the accepted practice that if there was a large venire, as there was in this murder case, all of the seats in the courtroom would be cleared for the venire." (Exhibit CC to Defendants' Motion, par. 3.)

Third, the defendants themselves submitted affidavits in which they state that they learned after the fact that their family members had been excluded from the courtroom. (Exhibits AA and BB to Defendants' Motion.) Fourth, the defendants point to a comment that the trial judge made during his "pretrial instructions and admonitions" to the jurors. To wit: "There will be spectators in this courtroom. They are going to look over in the jury box. . . . [I]t seems to me if you're dressed appropriately it looks as if you have accepted that terrible, weighty responsibility of being a juror in this serious case." (Trial Transcript, Volume II, at 216-17. The fact that the trial judge informed the jury to expect that spectators "will" be in the courtroom, the defendants contend, demonstrates that there had not been any spectators during the jury selection process. Based on this evidence, the Court assumes for purposes of the present motion that the courtroom was closed during jury selection, that the defendants were aware of that

³⁷In his affidavit, the trial prosecutor states: "To the best of my memory, the courtroom was never closed to the public during the trial of Mr. Barry and Mr. Cahill. It was never an issue discussed at the trial, at sidebar, or otherwise." (Exhibit T to Commonwealth's Opposition, par. 10.)

³⁸The trial judge made this statement to the ten jurors who had been selected on the first day of trial after instructing and sending out the group of prospective jurors who were to return the following day. (See Trial Transcript, Volume II, at 213-15 (instructions to returning potential jurors); Trial Transcript, Volume II, at 215-20 (instructions to ten chosen jurors).)

closure, and that the defendants' attorneys were aware that courtroom closures were customary during jury selection.³⁹

"The closing of a proceeding to the public may implicate rights guaranteed by . . . the United States Constitution." Commonwealth v. Dver. 460 Mass. 728, 735 (2011). "The right to a public trial extends to the jury selection process." Commonwealth v. Alebord, 467 Mass. 106, 111 (2014); Dver. 460 Mass. at 735. "It is well settled that the violation of a defendant's right to a public trial is structural error." Commonwealth v. LaChance, 469 Mass. 854, 857 (2014). "Where a defendant raises a properly preserved claim of structural error, [the] court will presume prejudice and reversal is automatic." Id. Where, however, the defendant or his attorney "fail[] to lodge a timely objection to the closure of the court room, the defendant's claim of error is deemed to be procedurally waived." Id.

In the present case, the defendants did not raise the issue of courtroom closure after learning of the exclusion of their family members, either at trial or in their first new trial motion.

Compare Commonwealth v. Lopes, 89 Mass. App. Ct. 560, 560 (June 15, 2016) ("This is the rare case in which a court room closure was ordered over the defendant's objection during jury empanelment"). ""[A] defendant must raise a claim of error at the first available opportunity."" Commonwealth v. Wall. 469 Mass. 652, 673 (2014), quoting Commonwealth v. Morganti. 467 Mass. 96, 102 (2014), in turn quoting Randolph. 438 Mass. at 294. Therefore, the

³⁹Barry has not submitted an affidavit from his attorney regarding this issue. Given Cahill's attorney's statement in his affidavit that such closures were "accepted practice" in cases with large venires, however, it is reasonable to presume that Barry's attorney was aware of this "accepted practice" as well. That awareness notwithstanding, it is clear from the affidavit that Barry knew of the closure in time to raise the issue at trial. See Commonwealth v. Lavoie, 464 Mass. 83, 88-89 (2013) (holding that defendant or defense counsel may waive defendant's right to public trial during jury selection).

defendants' "right to a public trial during jury empanelment has been waived." <u>Id. Contra Lopes</u>, 89 Mass. App. Ct. at 563 (holding defendant's "claim of error . . . was preserved").

The Court reviews "unpreserved claims of error . . . to determine if a substantial risk of a miscarriage of justice occurred." LaChance, 469 Mass. at 857. The defendants have not made such a showing, as "there is no serious doubt whether the result of the trial might have been different had the court room not been closed to" their family members and the public. Wall, 469 Mass. at 673, quoting Randolph, 438 Mass. at 297. See also Dver, 460 Mass. at 737 ("The defendant points to no factors suggesting, notwithstanding the waiver, that a substantial likelihood a miscarriage of justice occurred."). The defendants are not entitled to a new trial on this basis.

VIII. Ineffective Assistance of Counsel

The defendants argue that they are entitled to a new trial because the attorneys who represented them at trial and the attorneys who represented them in their first new trial motion were "ineffective for failing to address the various . . . trial errors" discussed ante. See

Commonwealth v. Shippee, 83 Mass. App. Ct. 659, 667 (2013) ("The defendant maintains that his counsel was ineffective for failing to address the various unpreserved trial errors now argued on appeal."). "In view of [the Court's] disposition of these arguments, there is no showing of ineffective assistance. . . . The failure to pursue futile or improbable arguments at trial cannot constitute ineffective assistance." Id. at 667-68 (citations omitted). That conclusion notwithstanding, the Court will address the defendants' ineffective assistance arguments in the interest of completeness.

To prevail on an ineffective assistance of counsel claim, the defendants "bear | the

burden of demonstrating [1] that 'there has been serious incompetency, inefficiency, or inattention of counsel – behavior falling measurably below that which might be expected from an ordinary fallible lawyer,' and [2] that, as a result, the defendant[s] [were] 'likely deprived . . . of an otherwise available, substantial ground of defence.'" Commonwealth v. Boria, 460 Mass. 249, 252 (2011), quoting Saferian, 366 Mass. at 96. With respect to the second prong, the defendants must establish "that better work might have accomplished something material for the defense." Commonwealth v. Whitman, 430 Mass. 746, 757 (2000) (citations and internal quotations omitted). The Court "need not reach" the second prong if the defendants cannot meet their burden under the first prong. Commonwealth v. Kolenovic, 471 Mass. 664, 673 (2015). 40

A. Whitson Affidavit

In addition to arguing that the Whitson Affidavit constitutes newly discovered evidence entitling them to a new trial, the defendants maintain that their attorneys' failure to uncover this information for use at their trial or in support of their first new trial motion amounted to ineffective assistance of counsel. Arguably, the defendants' failure to meet the first prong of the newly discovered evidence test means that they can satisfy the first prong of the ineffective assistance of counsel test: that is, their attorneys' conduct falls "measurably below that which might be expected from an ordinary fallible lawyer" because due diligence could have uncovered the information in the Whitson Affidavit sooner.

⁴⁰The defendants could have raised many of these issues in their first new trial motion, but did not. These issues are therefore waived. See Commonwealth v. Mahar, 442 Mass. 11, 13 n.4 (2004) ("[P]ostconviction motions for a new trial based on grounds available but not [previously] raised . . . are waived."). "[T]he issue of waiver here is without substantive effect[,]" however, because the standard applicable to waived claims "and the standard applicable to ineffective assistance of counsel claims are, insofar as both determine whether error affected the outcome, 'two sides of the same coin'" Id. (citation omitted).

The second prong of the newly discovered evidence test "is substantially the same as the Saferian ineffective assistance of counsel standard: 'whether [defense counsel's omission] has likely deprived the defendant of an otherwise available, substantial ground of defence.'" Tucceri, 412 Mass. at 413 (alteration in original). For the same reasons that the defendants cannot satisfy the second prong of the newly discovered evidence test, therefore, see ante, the defendants likewise cannot satisfy the second prong of the ineffective assistance of counsel test. Uncovering the information contained within the Whitson Affidavit would not "have accomplished something material for the defense" either at the time of trial or in their first new trial motion.

See Whitman, 430 Mass. at 757 (holding that court "'will not reverse a conviction on this basis unless the defendant shows that better work might have accomplished something material for the defense." (quotation marks and citations omitted)).

B. Kevin McElfresh

The defendants argue that their attorneys were ineffective in failing to challenge McElfresh's testimony – their trial counsel by failing to object at trial, and their successor counsel by failing to raise the inadmissibility of his testimony in their first new trial motion. This Court has concluded ante, however, that McElfresh's testimony at the defendants' trial did not violate their constitutional right to confrontation because, contrary to the defendants' contention, the record establishes that he was not a "substitute" expert. Therefore, any attempt to object to his testimony at trial or to raise the issue in their new trial motion would have been futile and, accordingly, does not reflect ineffective assistance of counsel. See Boria, 460 Mass. at 253; Commonwealth v. Carroll, 439 Mass. 547, 557 (2003) ("Any objection . . . would likely have been futile, and counsel's failure to object did not constitute ineffective assistance of counsel.").

C. Courtroom Closure

The defendants argue that trial counsel's failure to preserve their courtroom closure claim by not objecting at trial, and their subsequent counsel's failure to raise it in their first new trial motion, constitute ineffective assistance of counsel. See LaChance, 469 Mass. at 858 ("If an error is waived due to the failure of trial counsel to object, [the court] may still have occasion to review the error in the postconviction context of a claim of ineffective assistance of counsel.");

Alebord, 467 Mass. at 113 (same); Morganti, 467 Mass. at 103 (same). "In evaluating the conduct of counsel, it 'must be measured against that of an "ordinary fallible lawyer"... at the time of the alleged professional negligence, and not with the advantage of hindsight." Alebord, 467 Mass. at 114, quoting Drew, 447 Mass. at 641. Applying an objective standard to assess counsel's conduct, the Court "look[s] to whether the conduct fell within a range of professionally reasonable judgments based on the professional norms as they existed at the time." Id., citing Strickland, 466 U.S. at 687-88.

Where the prevailing custom and practice of the courthouse was to exclude the public from a courtroom during jury empanelment to accommodate a large venire, the defendants' trial attorneys' failure to object to the closure "did not constitute the ineffective assistance of counsel" so defined. Id. Raising the issue in the defendants' first new motion trial would thus have been

⁴¹The defendants' argument that their attorneys were ineffective for failing to object to or to raise the trial judge's having conducted the hardship inquiry of the venire outside the presence of the defendants and their counsel has no merit. Years before the defendants' trial, the Supreme Judicial Court held that the trial judge's practice was not inappropriate because it did not occur at a "critical stage" that required the defendant's presence. <u>Barnoski</u>, 418 Mass. at 531. Any challenge to this practice on the defendants' behalf, therefore, would have been futile. <u>See Boria</u>, 460 Mass. at 253 (noting that, even if defendant had raised the issue in initial appeal, "the appeal would have failed"); <u>Carroll</u>, 439 Mass. at 557 (holding that, "as any objection would likely have been futile, . . . counsel's failure to object did not constitute ineffective assistance of counsel").

futile, and the failure to raise it "cannot have rendered [subsequent counsel's] performance 'measurably below that which might be expected from an ordinary fallible lawyer.'" Boria, 460 Mass. at 253.

D. Telephonic Evidence Without a Warrant

The defendants argue that the police accessed "telephonic evidence" without a warrant, as Riley v. California, 134 S. Ct. 2473 (2014), requires. In Riley, the United States Supreme Court held that "a warrant is generally required before" information on a cell phone is searched, "even when a cell phone is seized incident to arrest." Id. at 2493. Although the Commonwealth used telephonic evidence in its case against the defendants, that evidence was not obtained from a warrantless search of the defendants' cell phones.

In the days following the shootings, the Massachusetts State Police and Malden Police

Department executed search warrants at Barry's Melrose, Massachusetts residence and at

Cahill's Randolph, Massachusetts residence. (Exhibit X to Commonwealth's Opposition.) With

respect to the warrant for Barry's residence, the police intended to search for various specified

items, including "cell phone records and bills; credit card records, receipts and bills; address

books; ... personal telephone books; papers containing the names of persons known to Anthony

Barry; [and] a caller identification box[.]" (Exhibit X to Commonwealth's Opposition.) The

inventory of the 41 items of property taken pursuant to that search warrant included an address

book, a cell phone record for phone number 781-249-1537, and "[m]iscellaneous paperwork –

personal notes[.]" Id. Additionally, a search incident to Cahill's arrest yielded a notebook and

pieces of paper that contained telephone numbers. (Trial Transcript, Volume IX, at85-87; Trial

Exhibit 76 (photocopies from notebook).)

The police subsequently subpoenaed from Bell Atlantic and Omnipoint the subscriber information for the telephone numbers found in Cahill's notebook. (Trial Transcript, Volume IX, at 96-97, 102.) The Omnipoint records led the police to a cell phone store that John Villa owned. (Trial Transcript, Volume IX, at 97.) Villa testified at trial. Through records kept in the ordinary course of his business, Villa's testimony demonstrated that, in March of 1999, Barry and Giangrande, using different names and faise addresses, purchased pre-paid cell phones, pre-paid phone cards, and pagers. (Trial Transcript, Volume IX, at 42-43, 46-67; Trial Transcript, Volume IX, at 98.) The police also subpoenaed from Bell Atlantic the subscriber information for a telephone number for Giangrande's residence that Porreca had on him at the time of the shooting, and the telephone numbers for Barry's and Cahill's residences. (Trial Transcript, Volume IX, at 110-14.) Using charts at trial, the Commonwealth, through a police witness, demonstrated that Barry and Giangrande had called and beeped one another several times in April of 1999, including on the day of the shooting. (Trial Transcript, Volume IX, at 120-26.)

1. Evidence Seized Incident to Cahill's Arrest

The defendants argue that defense counsel erred in failing to move to suppress the telephone numbers contained within the items found on Cahill's person, because the police did not lawfully seize those items. "[A] warrantless search incident to arrest, one of the recognized exceptions to the warrant requirement, may permissibly include a search of the arrestee and items found on his person." Commonwealth v. Berry, 463 Mass. 801, 806 (2012). "[T]he police are authorized to conduct a search incident to arrest 'only (1) for the purpose of seizing evidence of a crime for which the arrest has been made in order to prevent its destruction or concealment or (2) for the purpose of removing any weapon the person arrested might use to resist arrest or to

escape." Commonwealth v. White, 469 Mass. 96, 99 (2014) (quotation omitted), citing G.L. c. 276, § 1; Commonwealth v. Phifer, 463 Mass. 790, 794 (2012) (same). The telephone numbers seized were clearly not weapons, but rather constituted evidence that could possibly have been destroyed and linked Cahill to the shootings. See White, 469 Mass. at 99.

In Riley, the Supreme Court declined to extend the search incident to arrest exception "to searches of data on cell phones, and [held] instead that officers must generally secure a warrant before conducting such a search." 134 S. Ct. at 2485. The Court based this decision on the conclusions that "the digital contents of cell phones 'place vast quantities of personal information' in the hands of the police, that the search of a cell phone 'bears little resemblance to the . . . brief physical search[es] considered" in earlier cases," and that factors such as "officer safety and prevention of destruction of evidence . . . have little application in the context of a search of a cell phone incident to arrest." Commonwealth v. Dvette, 87 Mass. App. Ct. 548, 558, quoting Riley, 134 S. Ct. at 2485.

The search that occurred in the present case is not analogous to the searches of cell phones at issue in Riley. In fact, the Court explicitly rejected the United States' argument "that a search of all data stored on a cell phone is 'materially indistinguishable' from searches of' items found on an arrestee's person such as a zipper bag, billfold, address book, and wallet. Riley, 134 S. Ct. at 2488. The Court likened that argument to "saying a ride on horseback is materially indistinguishable from a flight to the moon. . . . [because] [m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." Id. Further, the concurring justice in Riley noted that "[i]t has long been accepted that written items found on the person of an arrestee may be examined and used at trial." Id. at

2496, and cases cited (Alito, J., concurring); <u>see id.</u> (contrasting suspect number one with hard copy of telephone bill in his pocket and suspect number two with cell phone in his pocket, and pointing out that "the police may seize and examine the phone bill . . . without obtaining a warrant, but . . . the information stored in the cell phone is out"). <u>See also United States</u> v. <u>Rodriguez</u>, 995 F.2d 776, 778 (7th Cir. 1993) ("[T]he search of [defendant's] wallet and the photocopying of the contents of the address book were permissible as a search incident to arrest."); <u>United States</u> v. <u>Molinaro</u>, 877 F.2d 1341, 1346-47 (7th Cir. 1989), and cases cited (rejecting as contrary to "clear authority" defendant's argument that, "even if his wallet was taken after he was placed under arrest, agents did not have the authority to search its contents without first obtaining a warrant").

Accordingly, <u>Riley</u>'s warrant requirement is not implicated on these facts. Any attempt to suppress the telephone numbers contained within the items found on Cahill's person at the time of his arrest would have been futile, as they were part of the evidence lawfully seized incident to Cahill's arrest. The defendants' motion for a new trial must be denied on this basis.

2. Subscriber Information

The issue of the subscriber information is likewise distinguishable from the situation in Riley, as the police here needed no warrant to obtain such information from the telephone companies. "[T]elephone subscribers have no reasonable expectation of privacy in telephone records under the Fourth Amendment to the United States Constitution[.]" Commonwealth v. Chamberlin, 473 Mass. 653, 657 n.6 (2016), citing Smith v. Maryland, 442 U.S. 735, 743-45 (1979). Additionally, "telephone subscribers have no reasonable expectation of privacy in telephone records under art. 14 of the Massachusetts Declaration of Rights[.]" Id. (citation

omitted). Instead, such records may be obtained by subpoena "on 'reasonable grounds for belief' of [the] telephone's use for 'unlawful purpose[.]'" <u>Commonwealth</u> v. <u>Augustine</u>, 467 Mass. 230, 244 (2014) (citation omitted).

As the record establishes that the police obtained the defendants' subscriber information through the subpoena process, and as the defendants have failed to demonstrate that the police had no "reasonable grounds" to believe that the defendants' telephones were being used for an "unlawful purpose[,]" any attempt by defense counsel to argue before trial, during trial, or after trial that the information should have been suppressed would have been futile. Accordingly, the defendants' motion for a new trial on this basis must be denied.

E. Legal Instructions at Grand Jury

The defendants finally argue that they were entitled to discovery of the legal instructions that the grand jury had been provided, and that their attorneys were ineffective for failing to request them from the Commonwealth, for failing to move for dismissal of the cases against them because the Commonwealth failed to turn the instructions over, and for failing to raise this issue in the defendants' first new trial motion. The defendants correctly note that "[a] prosecutor may advise a grand jury on the law 'in appropriate instances.'" Commonwealth v. Kelcourse, 404 Mass. 466, 468 (1989), quoting Attorney Gen. v. Pelletier, 240 Mass. 264, 307 (1922). As the Commonwealth points out, however, the Appeals Court has rejected the contention that defendants are constitutionally entitled to have access to these instructions.

While a defendant "is entitled to 'the written or recorded statements of a person who has testified before a grand jury[,]" and while "testimony before the grand jury" must be transcribed, a defendant's claim that he was "entitled to a dismissal of the case because he did not have

access to the instructions to the grand jury" has no merit. Commonwealth v. Azar, 32 Mass.

App. Ct. 290, 293 (1992) (emphasis in original); see also Commonwealth v. Clemente, 452

Mass. 295, 314 n.30 (2008) ("A transcript to the grand jury testimony must be provided to the defendant." (emphasis added)). Any attempt by the defendants' attorneys to raise this issue prior to trial, at trial, or after trial would thus have been futile; so the failure to do so cannot be considered ineffective assistance. See Boria, 460 Mass. at 253 ("It would not have mattered whether the issue had been included in [defendant's] initial claim of appeal [because] the appeal would have failed"); Carroll, 439 Mass. at 557 ("Any objection . . . would likely have been futile, and counsel's failure to object did not constitute ineffective assistance of counsel.").

F. Conclusion

For the foregoing reasons, the defendants have failed to meet their burden of demonstrating that they received ineffective assistance of counsel at the trial and/or post-trial stages of their prosecution. Their motion for a new trial on this ground, therefore, must be **DENIED**.

IX. Cumulative Impact

As a final thrust, "[t]he defendant[s] assert[] that the cumulative effect of the errors asserted by [them] require the granting of [their] motion for a new trial. Since [the Court has] found no errors, however, there is no cumulative effect." Commonwealth v. Gagliardi, 418 Mass. 562, 572 (1994); Commonwealth v. Lay, 63 Mass. App. Ct. 27, 36 (2005) (same). Six blanks do not make a bullet. The defendants' motion for a new trial must be **DENIED** on this ground as well.

CONCLUSION

For all the foregoing reasons, the Defendants' (Second) Motion for a New Trial shall be, and hereby is, **DENIED**.

SO ORDERED.

Robert B. Gordon

Justice of the Superior Court

Dated: September] 3, 2016

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT CRIMINAL ACTION NOS. 99-882, 99-883

COMMONWEALTH

٧.

ANTHONY BARRY and BRIAN CAHILL

FINDINGS OF FACT, RULINGS OF LAW AND ORDER ON THE DEFENDANTS' JOINT MOTION FOR A NEW TRIAL

I. <u>INTRODUCTION</u>

From April 4, 2000 to April 21, 2000 the defendants, Anthony Barry and Brian Cahill, were tried before Middlesex Superior Court Judge Robert Barton and a jury on indictments for the murder of Kevin McCormack, the non-fatal shootings of Brian Porreca and Lindsay Cremone, and related gun charges. On April 21, 2000, the jury returned verdicts convicting the defendants of first degree murder for McCormack's killing. Guilty verdicts were returned on all the other charges as well.

The defendants filed motions for a new trial and notices of appeal. The Appeals Court ordered that the defendants proceed first with their new trial motions. As Judge Barton had retired, the case was assigned to this judge. After several hearings on motions concerning post-trial discovery matters, an evidentiary hearing was held on March 20, 21, and April 16, 2003.²

Before turning to the factual findings from the hearing on the motion for a new trial, the court sets out the evidence from the trial.

^{&#}x27;The jury began its deliberations on April 20 at 12:50 p.m.; it returned the verdicts at 4:15 p.m. on April 21 after deliberating all day.

² The hearing was held in Norfolk Superior Court where this judge was assigned. Gayle Grayson was the court reporter on March 20 and 21; Dawna Chapin was the court reporter on April 16, 2003.

II. THE JURY TRIAL

The following statement of the evidence is gleaned from the submissions of the Commonwealth and the defendants, and the trial transcripts:

Kevin McCormack was twenty-nine years old when he was killed in a hail of gunfire on April 17, 1999. He lived in Malden at the time, and according to the death certificate, was self-employed in a retail business.³

Anthony Barry, whose date of birth is April 28, 1967, had grown up in the North End of Boston and in Medford. In the spring of 1999, he lived with his girl friend at 52 Slayton Road, Melrose. Brian Cahill, whose date of birth is September 29, 1963, also grew up in Medford. In the spring of 1999, Cahill was living at 62 Himore Circle, Randolph, with his step-mother. Cheryl Albrecht, his step-sister, thirteen-year old Brittany Cahill, his step-brother, Connor Cahill, and Cheryl Albrecht's husband, William Albrecht.

Brian Porreca was a former professional boxer who grew up and resided in Medford.⁴ In the spring of 1999, Porreca was forty years old. Porreca had a long criminal record and a long-standing drug habit. He had used heroin and Percocets. He was living in Medford with Anne Lynch, whom he referred to as his wife, and their three children, ages eleven, ten and eight. His oldest son, Brendan Porreca, was serving a state prison sentence.⁵

Porreca had known Anthony Barry for at least ten years. He considered Barry to be a friend. Porreca knew members of Barry's family for longer than that. Barry and Porreca both worked at times for Gene Giangrande, a bookmaker and drug dealer. Porreca had known Giangrande since Giangrande was three years old. Porreca, who was "good with his hands," had, for about ten years, occasionally collected Giangrande's outstanding gambling and drug debts. He was a "strong-arm" man paid by Giangrande in cash or Percocets. Giangrande, Barry, Porreca, and Giangrande's friend, Billy Angelesco, were all well acquainted with one another.

⁴ At one time, Porreca's mother was the mayor of Medford. Porreca knew many people in Medford, and was, in turn, known by many people in that city.

2

³ In her victim impact statement given at the time of sentencing on April 25, 2000, Lindsay Cremone spoke of her friend, Kevin McCormack and his daughters, ages six and two.

⁵ The court notes that in early July, 2003, the Commonwealth filed its Post-Hearing Memorandum in Opposition to the Motion for a New Trial. In the memorandum, the Commonwealth stated that on Thursday, June 19, 2003, Brian Porreca was found dead in a Las Vegas, Nevada, hotel room. The cause of his death had not yet been determined. In the absence of a death certificate or stipulation, the court does not consider this information in its decision.

Porreca also knew McCormack, whom he considered to be a friend, and McCormack's friends, John Whitson and Stephen Almeida.

Porreca had known Brian Cahill since childhood. Porreca considered Cahill to be a friend. In 1994 or 1995, Cahill asked Porreca to introduce him to Barry. After this, Barry and Cahill were often seen together.

On March 17, 1999, Barry and Giangrande walked into a store called "Mr. Penny," located in Boston's North End. Mr. Penny sells pagers, calling cards, cell phones, and related items. The pair purchased a prepaid cell phone under the name "Scott Davis," with an address of 52 Main Street, Medford. They also purchased a pager under the name of "Steve Masters," with an address at 14 Elton Way, Stoneham.

Meanwhile, leading up to the spring of 1999, Porreca was in serious trouble with federal authorities. Porreca had been named recently by another man, Tommy Regan, as being involved the 1995 kidnapping of a drug dealer named Digger Pollard. Believing that Pollard knew the whereabouts of a shipment of marijuana that they thought had recently come in from Mexico, Porreca and Regan kidnapped Pollard from a VFW post in Burlington and brought him to a house in Medford. In their attempt to force Pollard into revealing the location of the drugs, Regan doused Pollard with lighter fluid and lit a lighter, while Porreca had held a gun to Pollard. After about an hour, when it became clear that Pollard did not know where the marijuana was, Porreca and Regan returned him to the Burlington VFW. Porreca had never spoken to the federal authorities about the incident, although he knew the authorities wanted to learn the name of another one of his cohorts in the matter. Porreca had no intention of naming the other person. Now, in late March or early April, 1999, Porreca received a subpoena to appear before a federal grand jury investigating the Pollard matter.

On April 5, 1999, at about 2 p.m., Porreca and an acquaintance, George Mortimer, were standing together on Main Street in South Medford. Barry drove his black Lincoln Navigator up to them. Porreca mentioned to Barry that he had received a subpoena to appear before the federal grand jury concerning the Pollard matter. The conversation lasted about twenty-five minutes (as timed by Medford plain clothes detective Lauren Kane, who happened upon the

3

⁶ The record does not explain the long delay between the incident and the convening of the grand jury. One could infer that under the circumstances, Pollard and those involved in the crime were not talking to the authorities.

scene, and parked her unmarked police car nearby to observe the men, both of whom she knew.

Officer Kane did not hear the conversation.) During the conversation, Barry told Porreca that Kevin McCormack was a "piece of shit".

On Friday, April 9, 1999, Porreca and his lawyer met with federal authorities and Medford police officers. Porreca was told that unless he cooperated, he faced a federal prison sentence of twelve to fifteen and a half years for his involvement in the Pollard incident. They told him that if he cooperated, he could expect to serve approximately five years. The federal authorities gave him two weeks to make up his mind.

Porreca told his friends thereafter that he had promised his children that he would not return to prison.

On April 15, 1999, two men stopped into "G.I. Joe's Genuine Surplus" store in Malden. They asked the owner, Joseph Shepard, for gloves and hoods. According to Shepard, the men were in their early thirties and "Italian looking" (Shepard did not identify either man, but told an investigator later that he thought Cahill was in the store). While there, the men purchased the only two "Nomex" hoods⁸ that the storeowner had in stock. The two men also purchased the only pairs of sizes "large" and "extra large" "Hatch" brand thin-leather police gloves that were in stock. Finally, the two men purchased a green, surplus military .30 caliber ammunition can.

Also on Thursday, April 15, 1999, while Porreca was standing in front of a barbershop in Medford, Cahill drove up to him in a blue Ford pickup truck, owned by William Albrecht. Barry was seated in the passenger seat. There was some general conversation among the three men. Porreca said to Cahill, words to the effect, "you have not been around, and now your name is all over the place." Cahill and Barry laughed. Porreca asked Cahill how his son (Brendan Porreca) was doing. Cahill said that Brendan was doing drugs, and was not doing too well. Cahill asked Porreca where he was living. Barry tapped Cahill's knee and said, "I know where he lives." Cahill then said: "We're going to meet Gene now." Porreca had not known prior to this day that Cahill – not just Barry – was involved with Gene Giangrande.

On Friday, April 16, 1999, telephone company records and a notebook subsequently

⁷ There was no evidence adduced at trial that Barry or McCormack had a role in the Pollard matter.

⁸ Nomex hoods are black pullover synthetic hoods like those sometimes worn by police officers. Although the hoods cover the wearer's hair, neck and mouth, they reveal much of the wearer's face, including the forehead, eyes, cheeks, and nose.

seized from Cahill showed that Barry, Cahill, Giangrande, and another associate of Giangrande's, Billy Angelesco, were beeping and telephoning each other on cell phones almost two dozen times throughout the day. Barry used the prepaid cell phone that he and his companion had purchased under the name "Scott Davis." Giangrande used the pager purchased under the name "Steve Masters." Communication among the group quieted at approximately 9:30 P.M.

On April 16, 1999, Cahill told his 13 year-old stepsister Brittany that he was going out to eat that evening with Barry.

On April 16, 1999, Porreca consumed two or three Percocets. He played ball with his children. He was at home in the early evening, when his friend Steven Luongo called him from a car cell phone, telling him that he was about to be pulled over by a state police officer. Knowing that he was about to be arrested for driving with a suspended license, Luongo asked Porreca to telephone his wife, Mary. Porreca telephoned Mary Luongo. Porreca told her that her husband had been arrested. Mary Luongo asked Porreca to accompany her to the State Police barracks to pick up her husband. She said she wanted Porreca's company because she was concerned that her husband might be abusive towards her after he was released. Porreca agreed to accompany her. Mary Luongo picked up Porreca at his home in Medford.

At some point in the evening, Porreca paged Giangrande. Porreca also telephoned John Whitson at Cremone's Restaurant, 192 Pearl Street, Malden. He asked Whitson if McCormack was at Cremone's. Whitson, McCormack's best friend, replied that he was there.

When Porreca and Mary Luongo arrived at the State Police barracks in Danvers, Porreca was asked for his name, date of birth, and social security number. Porreca and Mary Luongo were informed that it would be at least an hour until Luongo would be released. Porreca became concerned that because he had a criminal past, there could be an outstanding warrant for him. Porreca asked Mary Luongo to drive him home.

Instead of directing Mary Luongo to his home, Porreca asked her to drive him to Cremone's. Once in the vicinity of Cremone's, Porreca asked Mary Luongo to drop him off about a block down the street, at the corner of Pearl Street and Whitman Street. To reach Cremone's, Porreca had to walk past or through the restaurant's adjacent parking lot.

By this time it was approximately 10:30 p.m. Porreca went inside Cremone's, and over

the course of the next hour and a half, consumed four or five Bud Light beers. The bar was full of people. In addition to McCormack and his friends Whitson and Stephen Almeida, Lindsay Cremone, age nineteen, was there with her friend Kristen Terfry. Lindsay was one of the owner's daughters. Lindsay's older sister, whose name does not appear in the record, was engaged to Whitson at the time. They also were the parents of a baby. The older Cremone sister was not at the bar that night, although Whitson had driven there in her rented white Oldsmobile Aurora. The Oldsmobile was parked in the restaurant's large parking lot, along with many other cars, including McCormack's.

While at Cremone's, Porreca spoke with McCormack. According to Porreca, one of his reasons for going to Cremone's was to warn McCormack of McCormack's "impending doom" at the hands of Barry and Cahill. There was no testimony that Porreca warned McCormack about Barry and Cahill that night.

At about 12:15 a.m. (now very early Saturday, April 17, 1999), Lindsay, Terfry, Almeida, McCormack, and Whitson decided to go to a club on Canal Street in Boston called "Jimmy Mack's." They invited Porreca to go with them. Lindsay said goodbye to her father and walked outside with the group, excepting Whitson, to her sister's Oldsmobile. The parking lot was well-lit.

McCormack got into the driver's seat of the car. 10 He fastened his seat belt. McCormack asked Almeida to go back inside and get Whitson, who was still in the bar. Lindsay got into the rear passenger seat of the Oldsmobile behind McCormack. Brian Porreca told Terfry to get into the back seat next to Lindsay, but Terfry ignored him and jumped into the front passenger's seat instead. Porreca remained standing outside the car on the passenger's side, between the front and the back seats. The back passenger's side door was open. Just then, Porreca heard voices coming from the rear of Cremone's parking lot. He saw two men wearing dark clothing and something like hoods pulled close around their faces. The hood-like objects covered the men's ears, hair and head. Porreca recognized the men as Barry and Cahill. Porreca saw Barry run to the driver's side of the Oldsmobile. Cahill, running low to the ground, came to the passenger side of the car. Porreca could not see the skin of Cahill's hands.

⁹ Ms. Cremone is referred to herein as "Lindsay" to avoid confusion with other Cremones.

¹⁰ This arrangement was not explained at trial.

Simultaneously, Lindsay was reaching to close the rear door on the driver's side, when

something caught her attention out of the corner of her eye. She saw a man, who was not "black" or "dark", running towards the driver's side of the car with a gun in his hand. The man's hands were covered with something. The man's head was covered with a hood, but she could see the shooter's face. She never identified the shooter, however.

Lindsay saw the man run up to the open rear driver's side door of the car and fire a shot directly into the back of McCormack's head. It was a shot from close range, but not any closer than two or three feet away. The bullet traveled from the back of McCormack's head to the front, pulpifying a significant amount of brain tissue in the process. The round finally came to rest just under the scalp in the front of McCormack's forehead. McCormack's head slumped down between the two front seats. He was dead within seconds. This .40 caliber round in McCormack's head was a mortal wound, as was a gunshot to his back from an Uzi semi-automatic pistol, fired from the passenger side of the car. That shot tore through McCormack's lung, abdomen and liver. In all, McCormack suffered at least eight gunshot wounds.

Meanwhile, Cahill came to within a half-car length of Porreca. Porreca looked at Cahill as Cahill shot him twice with an Uzi, once superficially through his abdomen, and again, grazing his wrist. Porreca turned and ran to take cover behind Cremone's restaurant. As he ran, he looked back to see if he was being chased. He heard the sound of gunshots, he saw Cahill firing into the car, and heard the girls in the car screaming for the shooters to stop. Lindsay was struck by two stray Uzi bullets fired by the gunman who stood on the opposite side of the car firing round after round into McCormack's body.

Terfry described the clothing of one of the assailants as dark. Terfry instinctively ducked and covered her head at the sound of the gunfire. Miraculously, Terfry was not shot, despite a number of gunshots having been fired through the front passenger's side headrest and seat back. When the shooting stopped. Terfry looked over at McCormack. Seeing matter coming from his neck, she scrambled out of the car, and ran into Cremone's for help. In the back seat, Lindsay, wounded and fearful that the shooters would return, told McCormack to get out of the car. He was unresponsive. Finally she gave up, crawled out of the car, and collapsed onto the ground.

A neighbor, Paul Buckley, was watching television in his home at 21 Whitman Street in

Malden. The residence was about one hundred yards from Cremone's. Just after midnight,

Buckley heard several gun shots, then he heard a car revving its engine extremely hard. He looked out his window and saw the car speeding away on Whitman Street with its lights off. The car was a dark, newer model, full-sized car. Buckley could not see into the windows of the car, which he believed were tinted.

Porreca ran into Cremone's holding his stomach. He yelled "call 9-1-1." Porreca approached Whitson (who with Almeida had retreated into Cremone's after hearing gunshots as they were heading into the parking lot) and cursed "fuck'n Barry and Cahill." Porreca then walked out into the parking lot where he saw Giangrande's girlfriend, Karen Minichello. He walked up to Minichello and told her to "tell Gene I'm going to blow his fuck'n head off. It's not over." He did not mention Barry or Cahill to her. Porreca explained his choice of names thus: "It was Gene Giangrande's crew, his friends who had just shot me, and I was mad at him, and I saw his girlfriend, so I knew she would relate to him the message to him that I was mad." Porreca denied that Giangrande was in the parking lot that night.

The police and emergency medical technicians arrived within minutes. Porreca and Lindsay were both rushed by ambulance to Massachusetts General Hospital ["MGH"]. Porreca was belligerent and uncooperative with the EMTs, but according to a paramedic, John Morrissey, Porreca appeared to be sober. During the ambulance trip, Morrissey asked Porreca if he knew who had shot him. Porreca replied that even if he knew who had done it, he would not tell Morrissey. He added that he would "take care of it" when he was discharged from the hospital. Porreca arrived at MGH's emergency room at 1 a.m. on Saturday, April 17.¹²

After the shooting at Cremone's, Michael Giordano, a Malden Police officer who had been on the police force for five years, was dispatched to the scene. Thereafter, he traveled by ambulance with Lindsay to MGH. While at the hospital, Officer Giordano attempted to speak with Porreca in the emergency room. He asked Porreca what happened. Porreca told him that two white guys had shot him, he knew who they were, but he wanted to talk to the FBI, not to

Whitson did not testify at the trial. Only Porreca testified to this naming of Barry and Cahill. Porreca did not mention this crucial statement in his grand jury testimony on April 20, 1999; he did however, testify to it during his videotaped deposition on January 5, 2000.

¹² After monitoring and treatment in the ER, Porreca was admitted from there to the hospital at 6:11 a.m. He had two wounds to the superficial abdominal muscles from a single gunshot, received from a side angle. Blood tests reported at 6:14 a.m. disclosed a blood alcohol level of .0735, and no acetominophen, salicylate or theophylline.

He again asked Porreca what happened. Porreca said he was in the parking lot at Cremone's, standing next to a car talking with McCormack and two women when two unmasked white men approached from the rear of the car and begin firing. He told Officer Giordano that he was shot in the stomach, and he ran into Cremone's. He said that as he ran, he looked over his shoulder and saw the men firing into the car. When Officer Giordano asked Porreca for the names of the shooters, Porreca said nothing, but gave him a look with his "nose twisted" and his "lips curled".

Back at the scene of the shooting, police discovered a .40 caliber Browning semiautomatic pistol on the ground by the white Oldsmobile where the assailant had dropped it after shooting McCormack in the back of the head. Later examination of the weapon disclosed no identifiable fingerprints, blood, tissue or other evidence. However, ballistics tests confirmed this to be the gun from which was fired the bullet to McCormack's head.

At approximately 2:30 a.m. on April 17, two youths walking home along the left side of Whitman Street towards Pearl Street (and Cremone's) after an evening of playing video games discovered an Uzi in the center of the sidewalk. They took the weapon home, and handling it with their bare hands, unloaded the remaining bullets, hid the weapon in their basement, and went to sleep.¹³ When they awoke later that morning they took the weapon to the police station. At the request of the Malden police, they drove with the police to Whitman Street and pointed out the location of the gun where they found it. Later examination of the weapon disclosed no identifiable fingerprints apart from one of the youths. Ballistics tests, however, confirmed that it was the gun from which the other bullets were fired, including the fatal one to the back of McCormack's torso.

State Police Trooper Edward Forster and Medford Police Sgt. Mark Mullaney were also dispatched to the MGH emergency room to interview Porreca in the early morning hours of April 17. After briefly meeting outside the room with Officer Giordano, Trooper Forster went into Porreca's bedside to speak with him. Trooper Forster asked Porreca directly who had shot him. Porreca smiled sarcastically and told him that "two black guys did it." When it became clear that the conversation was going nowhere, Trooper Forster asked Porreca if the "two black

¹⁴ Additional evidence of this conversation indicates that Porreca used an ugly, derogatory term.

¹³ Upon their arrival home, the girlfriend of one of the young men told them about a shooting that had happened that night.

After his admission to the hospital from the emergency room, Porreca remained at the hospital all day Saturday, and Saturday night.

At approximately 10:00 a.m. on Saturday, April 17, 1999. Cahill and his father, Tom Cahill, picked up Brittany Cahill from her friend's house in Quincy where she had spent the night on the evening of April 16. Once they were home in Randolph, Cahill asked Brittany to pick up a newspaper for him. Brittany went to the store and returned with the day's Globe or Herald. Cahill read the newspaper article about the murder at Cremone's to his father, and the two of them laughed aloud about the story. Brittany asked Cahill why he was laughing about the story of the murder, but he did not answer her.

During the day on Saturday, State Police Trooper Robert Manning went to MGH to visit Porreca. Trooper Manning told Porreca that he was not there to give him a hard time. He said that he understood that Porreca had said that two black guys had done the shooting. Porreca smiled and said, "Yeah, that was a good one, huh?" Trooper Manning told Porreca that he was aware of the federal investigation involving Porreca. He asked Porreca to take his business card in case he decided to talk. Porreca remained at the hospital into Sunday.

At about 10 a.m. on Sunday, April 18, 1999, as discharge plans were being discussed. Porreca told nurses that he would kill himself if sent home. A psychiatrist spoke with him, as evidenced by a lengthy note which did not mention any symptoms of drug use or withdrawal. The consulting psychiatrist credited Porreca's statements that he really did not intend to harm himself.

Later on Sunday, Lucio Pepe visited Porreca in the hospital. Porreca's mother and sister were there visiting him. Again, using the pejorative term, Porreca told his mother and Pepe that he had told the police two black men had shot him. Porreca told Pepe that if he could obtain a deal from the federal authorities, he might "start remembering something."

Robert Santasky (also known as Bobby Rogers) and Charles Guarino also visited Porreca in the hospital. Guarino had heard about the shooting, and had gone to the hospital at Anne Lynch's request. Guarino was a long-time friend of Barry's: he had known Barry for at least twenty-five years. Porreca told Guarino that he had gone to Cremone's to borrow money from McCormack. He said he was outside the restaurant talking to McCormack when "all hell broke

nasks. Porreca told Guarino that he could not identify the shooters because they were wearing masks. Porreca told Guarino that he was facing some sort of federal charge. Porreca said he would implicate Barry in the shooting, but if Guarino could reach out to Barry to give Porreca \$25,000. to "take off", it would be cheaper for Barry to pay Porreca than an attorney. If James Miscioscia, another friend of Barry's, also visited Porreca.

Porreca called Trooper Manning from the hospital on Sunday, April 18 either before or after the visits from Barry's friends. Trooper Manning returned to MGH and spoke with Porreca. Porreca told Manning that he could provide the police with the names of the shooters, but only if Manning would promise him that he would not have to do one day in prison for his involvement in the Pollard affair. Trooper Manning did not mention the names Barry or Cahill to Porreca: for his part. Porreca refused to name any person unless there was a deal first. Trooper Manning told Porreca that an agreement not to prosecute Porreca was the kind of promise that could only be made by his superiors. Trooper Manning told Porreca that in order to get such a commitment from his superiors, he wanted Porreca to give him information about the shooters that he could take to his superiors. Porreca refused to provide Trooper Manning with any hint of the shooters' identities in the absence of an agreement that he would not be prosecuted for his involvement in the Pollard affair.

Trooper Manning returned to MGH later that afternoon after talking with his superior and the federal prosecutors. Trooper Manning told Porreca that the top supervisor in the U.S. Attorney's Office had agreed that if he cooperated fully and truthfully in the state homicide investigation, and agreed to cooperate fully and truthfully in the federal case involving Pollard, an agreement would be reached that Porreca would not be prosecuted for the Pollard case.

Porreca was discharged into the company of the state police on the evening of April 18, 1999 with twenty Percocet tabs, Motrin 600 mg. for pain, and an antibiotic. He was instructed to return to the hospital in a few days for removal of sutures and a wound check. Porreca was taken immediately to the State Police detectives' office in the Middlesex Superior Courthouse. There, Porreca told Manning and other police authorities, including Special Agent John Mercer of Alcohol. Tobacco and Firearms, that Barry and Cahill had murdered McCormack and

¹⁵ Porreca denied telling Guarino that he did not know who the shooters were. He also denied asking Guarino for help in obtaining money from Barry in exchange for non-cooperation with the police in the murder investigation.

wounded Lindsay Cremone and himself. Middlesex prosecutors decided to memorialize

Porreca's statement by presenting Porreca to the grand jury on the next business day.

The next day, Monday, April 19, was Patriots' Day.

On Tuesday, April 20, 1999, Porreca testified before a Middlesex County grand jury sitting in Lowell. He again identified Barry and Cahill as the two shooters at Cremone's on April 17.

Meanwhile, on Tuesday, April 20, 1999, Cahill was at home in Randolph. He counted out \$900.00 in cash in front of Brittany. Brittany asked him how he had so much money, and Cahill replied that it was from "doing my business."

Plans had been made for Cahill to take Brittany and her cousin, Melissa Fosdick, to a carnival in Medford that day. Cahill, driving William Albrecht's blue Ford pickup truck, drove the girls to his brother's, Keith Cahill, house in Medford. Cahill drove along the highway, exiting at Mystic Valley Parkway. Cahill drove past a baseball field, and then drove straight towards Cremone's restaurant. While he was driving, Cahill talked to himself, laughed, and mentioned Porreca's name to himself. Just as he was passing Cremone's, Cahill stopped suddenly and made a little snickering or laughing noise as he looked out his side window. Cahill then dropped Brittany and Melissa off at Keith's house, arranging to meet them later in the day across from the carnival in Medford Square. Later that day, Cahill picked up the girls from the carnival. Once again, Cahill drove by Cremone's. Cahill then drove the girls home to Randolph.

Cahill was arrested at his residence in Randolph in the early evening of April 20, 1999. Shortly thereafter, pursuant to a search warrant, state and local police searched Cahill's residence. In Cahill's bedroom, on the side of his bed against the wall, State Police Trooper Peter Sennott located a green, surplus military .30 caliber ammunition can with a "G.I. Joe's, Malden, Massachusetts" price sticker on it. The ammunition can came from G.I. Joe's Genuine Surplus in Malden. Inside the ammo can was a pair of size "large" Hatch police gloves. The Hatch police gloves were identical to the items that Barry and his companion had purchased days before the murder from G.I. Joe's. The police continued to search for Barry.

On April 21, 1999, having testified before the grand jury the previous day, Porreca signed an agreement with the federal authorities involved in the Pollard matter that he would not

be prosecuted in that case in return for his truthful testimony and cooperation in that case, and in the McCormack murder investigation. Part of Porreca's agreement with the state authorities was protection for his son, Brendan, who at age twenty-two was serving two state prison sentences for armed robbery and mayhem. 17

On April 22, 1999, acting pursuant to a search warrant, state and local police searched Barry's apartment at 52 Slayton Road, Melrose. He was not at home. In the closet in Barry's bedroom, Malden Police Detective David Jordan found a big brown cardboard box. In the box were two bulletproof vests designed for wear by men. Underneath the bulletproof vests were two black Nomex hoods and one pair of size "extra large" Hatch gloves. The Nomex hoods and the gloves were identical to those Joseph Shepard had just sold to the two men in their thirties.

At approximately 4:30 p.m. on Sunday, April 25, 1999, a contingent of twenty-five to thirty police officers surrounded a waterfront house at 40 Olympia Road in Marshfield. The house belonged to the Sacco family, relatives of the Barry family. It was used frequently by Anthony Barry. Although it was still light out, the windows were closed and the shades were drawn. Several officers on the side of the house commanded the occupants to come out of the building. Barry and his girlfriend came out of the house with their hands in the air. Trooper Manning informed Barry that he was under arrest for the murder of Kevin McCormack. Barry replied, "Yeah. I know."

When police searched the Marshfield house that day, they discovered a notebook containing Cahill's telephone number and Giangrande's beeper and cell phone numbers. The beeper and cell phone numbers matched the numbers of the beeper and cell phone purchased by Cahill and Barry at Mr. Penny's. Police also discovered \$10,215 in United States currency. State Police Trooper Peter Sennott later determined that the addresses given by Cahill and Barry to the storeowner at Mr. Penny's for the cell phone and beeper in the names of "Steve Masters" and "Scott Davis" did not exist.

About two weeks after his arrest, Cahill telephoned Brittany from jail. He questioned her

¹⁶ Porreca faced a minimum of twelve and a half years in that case. According to retired federal chief probation officer Francesca Bowman, Porreca could have been sentenced to life. given his lengthy record and the charges in the Pollard case.

¹⁷ By the time of the trial, Porreca had received, inaddition to immunity from prosecution from the federal charges and a variety of state charges, an automobile and approximately \$36,000 to \$38,000 dollars in eash for living expenses.

¹⁸ Barry also was employed as a trucker/rigger by one of the Saccos.

about her discussion with the police. He directed her to not cooperate with them any further.

The conversation, which was recorded from jail, included the following:

Brian Cahill:

Brittany?

Brittany Cahill:

Uh-huh.

Brian Cahill:

Brit, let me ask you a question. When I dropped you off Friday

[sic] at my brother Keith's house, right -

Brittany Cahill:

Yeah.

Brian Cahill:

- Where did I drop you off?

Brittany Cahill:

Keith's?

Brian Cahill:

Yeah. Okay. And where did I pick you up?

Brittany Cahill:

The carnival?

Brian Cahill:

And then where - where did I go from there?

Brittany Cahill:

Across from that restaurant.

Brian Cahill:

Where was the restaurant? What did the restaurant look like, Brit?

Brittany Cahill:

It was white with green shutters, and the Orange Line runs in the

back of it. And, Brian, I know exactly where it is, because it's

near the field. 19

Brian Cahill:

What field?

Brittany Cahill:

I don't know; the big ball field.

Brian Cahill:

Do you mean I drove by there when I - the day I dropped you off

with Heather [sic]?

Brittany Cahill:

No. Brian, it's not me that's just saying it. Melissa's saying it too.

So it's obviously - I'm not sitting here trying to get you in trouble.

Brian Cahill:

Brit, I don't care what you say. Just tell the fucking truth 'cause

I've got nothing to hide.

Brittany Cahill:

I'm telling the truth, Brian.

Brian Cahill:

14

She told them that I drove by there laughing?

Cheryl Albrecht²⁰:

Huh?

¹⁹ This is an accurate description of Cremone's Restaurant.

²⁰Cheryl Albrecht had answered the phone initially and put Brittany on, alone, at Cahill's request. Cheryl Albrecht then came back on the line at some point during the call. She is Brittany Cahill and Connor Cahill's mother. She is Brian Cahill's step-mother.

Brian Cahill: She, she, she told them that I drove by there laughing?

Cheryl Albrecht: Is that what you told them, Brittany?

Brittany Cahill: No, Melissa said that you were laughing.

Brian Cahill: And what did you say, Brittany?

Brittany Cahill: I said that we just drove by there, and we did. And you can't deny

it either, Brian.

Brian Cahill: I don't remember Brittany if I - Brittany I don't remember if I

drove by there. I don't remember. Brit, what other questions did

they ask you?

Brittany Cahill: Where were you Friday night.

Brian Cahill: Yeah, you were gone. You were out.

Cheryl Albrecht: Yeah, she was out.

Brian Cahill: You was out.-

Brittany Cahill: And I also told them that you told me Saturday morning that you

didn't come home until 3:00. That's what I told them. That's all I knew. And that you talked to me Friday night when I was at the

party and you said you were going out to eat with Anthony.

Brian Cahill: And that's what you told them?

Brittany Cahill: Yeah.

Brian Cahill: Brit, those are the only other questions they asked you?

Brittany Cahill: No, and they asked - I told them - I said I wasn't serious to him

when he was so - Cause you were looking at the paper.

Brian Cahill: Yeah, that was the day you said something real smart to me, and I

said....

Brittany Cahill: Yeah go ahead. Just listen to me instead of yelling at me, Brian,

And all of a sudden you kept the newspaper to look at it. And I said "Brian, how come you're so interested?" When you were like,

"none of your business" and you walked away.

Brian Cahill: No, that's not what I said, Brit.

Brittany Cahill: Brian, don't lie. I'm not trying to get you in trouble, Brian.

Brian Cahill: Brittany, I don't care what you do, Brittany, cause whatever you

say, right, can never hurt me anyway, because I didn't do nothing

wrong.

Cheryl Albrecht:

Right but listen to -

Brian Cahill:

So you can tell your little -

Brittany Cahill:

I'm not going to sit here and have you yell at me. I'm old. . .

Brian Cahill:

Well, then -

Brittany Cahill:

Good. I hate you, too.

Brian Cahill:

Don't listen to Brittany. Brittany is full of a lot of fucking shit.

That's what Brittany is. Brittany is full of fucking shit. Brittany's got a lot of fucking pipe dreams going on in her head. I don't know what the fuck is on that girl's mind. . . . I really don't. I

really don't know what's on her fucking mind. . . .

Cheryl Albrecht:

Well, Melissa and Brittany -

Brian Cahill:

Melissa. Who the fuck is Melissa? Melissa fucking don't even fucking know me from a hole in the wall. Fucking thirteen year old girls. They are going to listen to the little thirteen year old girls? They're in fucking fantasy. They live in fantasy, listening to fucking rap fucking music. Are they all right? . . . Where is

Melissa at?

Cheryl Albrecht:

In Kingston, at home.

Brian Cahill:

Where she fucking belongs. What did her fucking family say?

Brit, you're not to answer no more questions to those people.

After Cahill and Barry's arrests. State Police Chemist Paul Zambella conducted a examination of the Nomex hoods discovered in Barry's apartment. He discovered a constituent of saliva located in the mouth area of one of the hoods. Chemist Zambella forwarded the sample for DNA testing.

Kevin McElfresh, a population geneticist working as the laboratory director and vicepresident of Boady Technology Group in Springfield, Virginia, testified on behalf of the Commonwealth.²¹ Dr. McElfresh was eminently qualified to testify concerning DNA testing and identification. By comparing DNA taken from the saliva on the Nomex hood with samples of Barry and Cahill's blood, Dr. McElfresh determined that the likelihood of a random match was one in one hundred and eighty-one billion. Dr. McElfresh opined that the DNA contained in the saliva on the Nomex hood matched Cahill's. Dr. McElfresh, who has extensively studied contamination of DNA samples, also determined that there was absolutely no evidence whatsoever of any cross-contamination of Cahill's blood sample with the saliva found onthe Nomex hood. In the year before the trial alone, Dr. McElfresh had seen the type of packaging used to package the DNA samples in this case over 100,000 times. He had never come across any problem with contamination with these types of samples.²²

In closing argument, the defendants emphasized the evidence that Brian Porreca was a despicable, lying, drug-addicted,²³ convicted drug user, self-described "strong-arm man" for Gene Giangrande who had identified Barry and Cahill in exchange for a very favorable deal: freedom from prosecution on the Pollard kidnapping and armed assault, in which he would have faced at least twelve to fifteen years, and upwards to life, in prison; cash for living expenses for himself and his family (with the implication that he was using some of the cash to purchase drugs); a car; and protection for his son Brendan who was incarcerated.²⁴

Given the question by Trooper Forster early on in the investigation, asking if "Brian" and

Boady Technology Group is a fully accredited, secure, scientific laboratory that has been selected by the United States government for numerous high level projects, including the exhumation of the crypt at Arlington National Cemetery of the Tomb of the Unknown Soldier from the Vietnam War. Through the work of Dr. McElfresh's team, the remains in the crypt were identified and returned to the soldier's family.

To counter Dr. McElfresh's damaging testimony, Cahill's attorney presented the testimony of Dr. Donald E. Riley. Dr. Riley opined that there was a one in fifty chance that the DNA samples in this case had been cross-contaminated. Dr. Riley, who teaches and works in Washington state and testifies nationwide, had earned approximately \$85,000 testifying on behalf of defendants in Massachusetts in the previous year alone. He had never testified on behalf of the prosecution in any case. In the course of his entire professional career, he had tested DNA in a total of two cases. The laboratory at which he works is unaccredited.

²³ In addition to evidence concerning Porreca's drug use from Porreca himself, the defense called Brendan Porreca as a witness. Brendan testified that his father used narcotics and alcohol. He also testified as a character witness against his father, stating that his father had a poor reputation for truthfulness.

As Porreca was the only witness who identified Barry and Cahill, his credibility was sharply challenged throughout the defendants' cross-examination of pertinent witnesses, including Porreca himself, and by the presentation of witnesses who undermined Porreca's testimony, to wit, Charles Guarino and Lucio Pepe.

"Anthony" were involved in the shooting, and Porreca's failure in his grand jury testimony shortly after the murder to have mentioned his conversation with Whitson at the scene, in which he named Barry and Cahill, the defense argued that the police rushed to judgment and Porreca, manipulator that he was, took advantage of the circumstances to falsely accuse the defendants.

The defense questioned whether the evidence suggested instead that Porreca himself was involved in setting up McCormack's killing: by calling Whitson earlier in the evening to confirm that McCormack was at the restaurant; by asking Mary Luongo to drive from Danvers to Malden before they accomplished their intention of bailing out her husband; by directing Mrs. Luongo to drop him off a little distance away from Cremone's where he would be able to walk by or through the parking lot; by counting on McCormack's routine of heading into Jimmy Mack's shortly after midnight; by insisting that both girls get into the back seat of the car; by failing to warn McCormack of his "impending doom"; and by standing at the open car door as a signal to the shooters once McCormack was seated and belted into the front seat. The defense questioned why Whitson, who told Porreca that McCormack was at the bar, never came out into the parking lot and why Porreca never yelled as he saw the shooters approach, and he did not run until after he was shot. There was also a suggestion by the defense that Giangrande was involved in the shooting.

III. <u>NEW TRIAL EVIDENCE</u>

In support of their joint motion for a new trial, the defendants rely upon evidence that they claim strengthened their attack on Porreca's credibility: additional, and objective, evidence of his opiate addiction, intoxication and/or withdrawal at key times; evidence that Porreca said he did not know who shot him because the men were wearing masks; hearsay evidence that Giangrande and Angelesco had admitted against their penal interests to being the killers; and evidence of Porreca's delusional belief in aliens. In addition, the defendants assert that their attorneys rendered ineffective assistance in representing them.

A. Porreca's Opiate Addiction

Additional evidence, by affidavits, and the testimony of Anne Lynch, Brendan Porreca and Steven Luongo was presented at the hearing on the motion for a new trial concerning Porreca's addiction to and use of opiates.

I. Anne Lynch

Anne Lynch of Medford, had lived with Porreca for seventeen years. Together they had three children, ages eleven to eight, with whom they lived. According to Lynch, Porreca snorted six to ten small bags of heroin a day, and used Percocet and cocaine, drug habits, that continued to the time of the shooting.

A day or two after his discharge from M.G.H., Porreca called Lynch and told her the police had taken him to the hospital. He said they were going to get him "straight." Thereafter, she was picked up by Agent Mercer and another officer and taken to Wilmington to see Porreca. Porreca looked "okay", but was weak and sick. Lynch, Porreca and their children moved to Maine where they stayed until February. 2001. In early January. 2000, Porreca was gone for a few days to testify at his deposition. When he returned, he was exhibiting the effects of one of his drugs, Klonopin. When he became abusive, Lynch called the local police and obtained a restraining order. The court accepts Lynch's testimony that Porreca was a narcotics user at the time of the shooting. It is cumulative, however.

2. Steven Luongo

Steven Luongo was a close friend of Porreca's, having known him for about twenty-five years. He also knows Barry and Cahill. Luongo saw Porreca on a daily basis in the spring of 1999. Although he, Luongo, claimed he had been drug-free for three years prior to April, 1999, he knew that Porreca snorted five to ten bags of heroin a day. The court does not believe Luongo's testimony.

3. Brendan Porreca

According to Porreca's son, Brendan, Porreca was a drug addict at the time of the shooting. The court does not credit Brendan Porreca, who has a violent criminal record.

4. Hospital Record of April 21, 1999

The defendants contend that the most significant evidence presented were the medical records from Saints Memorial Medical Center in Lowell, and in particular, the ones relating to a visit by Porreca on April 21, 1999, in the evening of the day that Porreca signed the cooperation agreement with federal authorities.²⁵ The records reflecting this visit to the emergency room are exculpatory in the sense that they tend to impeach some of Porreca's trial testimony about the currency of his drug addiction. The records were not known to the district attorney prior to trial;

On April 21, 1999, Porreca and his attorney met with the United States attorney to sign the agreement concerning the Pollard case.

they were not provided to the defendants prior to trial.

The Saints Memorial records reflect the following:

On April 21, 1999, ²⁶ Porreca arrived at the hospital at 2115 (9:15 p.m.) in the company of state police. ²⁷ He reported a past medical history of "heroin" and medication of 80 [m]g of methadone. He complaint to the triage nurse was "I'm drug sick". The police stated that Porreca had been up most of the night throwing up. The history indicated that Porreca had been seen at MGH for a gunshot wound and was given methadone over the weekend. Porreca's vital signs revealed a normal temperature, a heart rate of 58, blood pressure of 142/83 and a respiratory rate of 20. It appears that no tests were done. Physical examination, diagnosis and treatment as recorded by the doctor at 2136 hours (9:35 p.m.), are brief: "heroin withdrawal", "Requesting methadone", diagnosis of "heroin withdrawal", and treatment with application of a Catapres 2 patch to his left shoulder at 9:50 p.m. Upon discharge, Porreca had a steady gait, and voiced understanding to follow up as planned on Friday. He was discharged back to the police.

Three days later, on April 24, 1999, at 10:21 a.m., Porreca returned to Saints Medical Center for suture removal. He gave a history of having previously been treated for a bullet wound. He stated that he came in for removal of his abdominal sutures because he did not have them removed the previous day at M.G.H. He told hospital personnel that he was in the area in the company of the state police. The wound was examined and the sutures were removed. His temperature was 97.4, heart rate was 64, blood pressure was 117/67 and respiratory rate was 16. No medications were given or prescribed. Following removal of the sutures, Porreca was discharged at 10:37 a.m.

During pretrial discovery, the defendants specifically asked for all exculpatory evidence, including evidence useful for impeachment. The motion was allowed. At the time the pretrial conference report was filed in August, and the discovery motion was allowed in October, 1999, Trooper Robert Manning had long been in possession of this responsive, discoverable information which was potentially exculpatory. Trooper Manning was aware that on the evening of April 21, 1999, Porreca had been taken by Massachusetts state police to the emergency room

²⁶ The record contains one handwritten entry with a date of April 20, 1999. Most of the dates in the record, however, reflect the date of April 21, 1999. which the court finds to be the date of admission to the emergency room.

There were no police reports concerning this hospital visit, or the one a few days later for suture removal.

of Saints Memorial Center in Lowell, Massachusetts. Although Trooper Manning was not with Porreca at the time he went to the hospital on April 21, 1999, he was told of the visit by State Police Lt. Sullivan. Lt. Sullivan said that Porreca was sick on April 21, so they brought him to the emergency room. Trooper Manning was aware that such emergency room visits would generate hospital records. Trooper Manning did not relate this information to the prosecutors at any time before the trial.

The Commonwealth never revealed that Porreca had received hospital treatment for alleged heroin withdrawal; that evidence became available to the defense only after this court specifically ordered the government to disclose any role it played in obtaining any such treatment.

Two doctors offered evidence as to the medical significance of the April 21, 1999 emergency room record. At the hearing on the motion for a new trial, the defense presented Dr. Brian Johnson, to interpret the records of Saints Memorial Hospital, MGH and offer opinions based on those records and other evidence. Dr. Johnson did not treat Porreca. His testimony solely concerned the records of treatment and his interpretation and opinion, in light of his extensive experience with diagnosing and treating drug addicted patients.

Dr. Johnson is board certified in psychiatry and has added qualifications in addiction psychiatry. He has a private psychoanalytic practice. He has taught Harvard psychiatry residents since 1981. He has been medical director of detoxification facilities, and has extensive experience relating to heroin addiction. He was well qualified to offer opinions on the subject of heroin and opiate addiction, withdrawal and treatment.

A person who is addicted to heroin and under its influence, exhibits varying symptoms depending upon the level of intoxication. Percocet is also an opiate, consisting of oxycodone, combined with acetominophen. Percocet, like heroin, is a powerful drug. The effects of opiate intoxication range from simple disinhibition, to inability to see, hear, and remember what has happened, to losing consciousness. The duration of heroin's effect depends upon the amount of heroin taken, the person's tolerance to it, and the time the heroin was last used. Intoxication usually happens in the first hour after taking heroin, then withdrawal usually begins about eight hours later. The main symptom of heroin, or other opiate, withdrawal is anxiety, which increases over a three day period. Since heroin, oxycontin, and Percocet are all opiate-based narcotics,

and the withdrawal signs and symptoms for all three drugs are virtually identical.

There may be a tendency to blame others as "the enemy". Nausea, vomiting and diarrhea may occur with withdrawal. The overall duration of withdrawal is about one week. According to Dr. Johnson, the emergency room record from M.G.H. does not reflect that Porreca was tested for opiates. However, blood tests reported at 6:14 a.m. at M.G.H. disclosed a blood alcohol level of .0735, and no acetominophen, salicylate or theophylline.

Dr. Johnson interpreted the Saints Memorial record to reflect that Porreca was anxious and hyperventilating, due to his respiratory rate of 20. The fact that methadone²⁸ was not prescribed was not unusual, as it is not permitted without a special license which many detoxification facilities have. Catapres is a brand name for Clonidine. It blocks the adrenaline flowing through the brain as a result of the anxiety caused by heroin withdrawal. The Catapres patch is an appropriate treatment for heroin withdrawal presented in an emergency room setting.

Assuming that Porreca had only two or three Percocets on April 16. 1999, and assuming that Porreca had an active heroin addiction at the time. Dr. Johnson opined that Porreca would have been in opiate withdrawal at the time of the shooting. The effect of such withdrawal would range from impaired to completely unable to see what was going on.²⁹ Dr. Johnson opined that vomiting indicated a severe case of opiate withdrawal. In such a case, the person going through withdrawal would tend to blame others, and believe that everyone around him was evil.

Relying upon an affidavit of James Miscioscia that contained a statement that Porreca called him from the hospital for "dollies", or methdadone tablets, Dr. Johnson opined that at the time of the shooting, Porreca was intoxicated on opiates, but not severely so. Because Miscioscia purportedly brought Porreca eight tablets of methadone, Dr. Johnson opined that Porreca probably used more than six to ten bags of heroin per day.

Dr. Johnson opined that Porreca's combativeness and agitation immediately following his being shot were "classic descriptions of an intoxicated individual." He also opined that

²⁸ Methadone is an artificial opiate. It has the same effect as heroin or oxycodone, but its effect is much longer lasting. The half-life of methadone is about ten times as long as all the other opiates, which usually have a three-hour half life.

²⁹ On the other hand, Dr. Johnson agreed that a person who recounts an event in substantially similar detail as another, credible and independent witness has described it, would be functioning well, despite opiate intake or withdrawal. Inter alia, Lindsay's trial testimony concerning the events at the time of the shooting, and the weapons and bullet fragments discovered shortly after the shooting, were consistent with much of Porreca's account of the shooting.

Porreca's conflicting accounts of what happened could represent the effects of heroin or opiate withdrawal.

The physician who treated Porreca at Saints Memorial Hospital and created the records at issue specifically did not diagnose Porreca with symptoms of heroin withdrawal. Rather, his professional opinion was that Porreca was an opiate addict who was attempting to manipulate him into prescribing him opiates. Dr. William A. Stuart attested that he is a diplomate of the American Board of Emergency Medicine, who works at Saints Memorial Medical Center in Lowell, Massachusetts. He was working in the emergency room there on April 21, 1999. Having reviewed the medical records regarding Brian Porreca's visit at approximately 21:36 on April 21, 1999, Dr Stuart recognized the handwritten notations, "Heroin withdrawal/requesting methadone," and "Heroin withdrawal - Catapres patch .2," on the document as his writing. He has no independent memory of having treated Mr. Porreca, but it was clear to him by looking at the records that this was an individual who came into the emergency room requesting methadone, and Dr. Stuart said no. Dr. Stuart noted that it is not unusual for patients to come to the emergency room stating they are withdrawing from drugs and request methadone³⁰ or other Dr. Stuart opined that the absence of any documented signs or symptoms of narcotics. withdrawal in the records indicated that he was not of the opinion, within a reasonable degree of medical certainty, that this patient was actually suffering from heroin withdrawal. In this situation, he typically prescribed, as he did here, the Catapres patch to alleviate potential withdrawal signs and symptoms, if any, that the patient might experience after discharge.

The court credits Dr. Stuart's affidavit, as it comports with the records themselves and other, credible evidence adduced at the trial, including the testimony of the paramedic that Porreca did not appear to be intoxicated, despite his belligerence.

B. <u>Porreca's Alleged Inability to Identify the Killers Because They Were Wearing</u> Masks

1. Steven Luongo

Luongo claimed that about a month or two after the murder, Porreca came alone to his house. Porreca told Luongo that he did not know who the shooters were because they were wearing masks. Porreca asked Luongo for a bag of heroin.

^{30 &}quot;Methadone is an artificial opiate,. The difference is in the half-life, "

Luongo and his wife Mary met with Trooper Manning before the trial. Manning asked Luongo if he had any knowledge about the murder case. Luongo said he did not.

Luongo is friendly with Lou Pepe. After Luongo signed his affidavit which was filed incident to the defendants' motion for a new trial, he asked Michael Barry for money. Michael Barry gave him \$300.

The court does not credit Luongo's testimony.

2. Anne Lynch

On April 17, 1999, Lynch was visited by a person named Franco Diorio. She had also been telephoned by Giangrande who was upset by Porreca's statement to Giangrande's girlfriend at the scene of the murder. Lynch called the police following her visit from Diorio. Later that day, she met with a Malden detective and a state trooper. She informed the officers that Giangrande had been calling her repeatedly and that his behavior concerned her. She told them that Porreca had told her that he could not see who shot him because they were wearing masks. The officers were taking notes. Counsel for the defense did not receive a copy of the notes, or any of the information supplied to the police that day by Lynch.

Anne Lynch spoke with Porreca by telephone on Sunday April 18. Lynch again asked Porreca who shot him. Porreca told her that he did not know because they were wearing masks. Later that day, Lynch received another telephone call from Porreca. He informed her that he was going "to do the right thing" and that he had a "friend" helping him. During that same conversation, Porreca told Lynch "it was easy," that the police already knew who the shooters were and that he "just had to say 'yes'."

Porreca passed the telephone to Agent Mercer of Alcohol, Tobacco and Firearms. Agent Mercer then informed Lynch that Porreca was "doing the right thing" and "wasn't going to have to worry about it."

A few months later, on July 4, Lynch again asked Porreca who shot him, he told her that he did not know because they were wearing masks.

Since the filing of the motion for a new trial, some of Lynch's expenses have been paid by Donald Bonner. a close friend of Michael Barry, and a close friend and business associate of Anthony Barry. The court does not credit Lynch's testimony on this issue.

3. Lonnie Hillson

Lonnie Hillson of Medford has known Barry his whole life. He also knows Porreca and Cahill. About a year after the trial, Hillson was getting gasoline when Porreca pulled into the same station. Porreca had his children in the car. Hillson called Porreca a "rat." Porreca said he just did what "the law" told him to do, and left quickly. Taking into consideration his convictions, including ones for uttering false prescriptions, and obtaining drugs by fraud, the court does not credit all of Hillson's testimony (the court finds that Hillson encountered Porreca and called him "a rat").

4. Michelle Mannke

Michelle Mannke was a close friend of Anne Lynch. Mannke also has known Barry very well for more than twenty years. When Lynch and her children left Porreca some months after the trial, they moved in with Mannke. Mannke saw Porreca occasionally when she drove the children to see him in his new location. Porreca told Mannke that "he had no choice to do what he did." He had to say what he had to say because of the situation he got himself in. He told her about the pending federal charge and that he made a deal. In response to her question about who shot him, Porreca told Mannke that he did not know.

Mannke saw Porreca in Florida at a cheerleading event in which their daughters, who were friends, participated. Mannke said to Porreca, "Brian, you know it wasn't Anthony." Porreca replied. "Yeah, I know it wasn't Anthony." Mannke did not take this information to the police.

Later, Porreca telephoned Mannke to say he wanted to reach out to the Barry family or Anthony Insogna to "make things right." Mannke contacted Insogna. who then contacted Porreca.

The court does not credit Mannke's testimony that Porreca said he knew Barry was not one of the killers.

5. <u>Donald Bonner</u>

After the trial, in March, 2002, Donald Bonner contacted Porreca in Florida. He traveled to Florida to speak with Porreca about how Porreca could assist Barry. Michael Barry, Barry's older brother, paid for Bonner's expenses. In Florida, Porreca said that the assailants had masks on, but he could not do anything about it now without hurting his situation. Porreca reportedly

told Bonner, however, that there was a way he could help out: he saw aliens. He claimed that this claim was in some of his hospital records, and he could not understand why it was not brought out at trial. Porreca told Bonner to confirm this with Lynch.

Before this visit in March, 2002, Porreca had never told Bonner that the assailants were wearing masks, or that he saw aliens in the past. The court does not credit Bonner's testimony on this issue.

After the trial, in March, 2002, Donald Bonner contacted Porreca in Florida. He traveled to Florida to speak with Porreca about how Porreca could assist Barry. Michael Barry, Barry's older brother, paid for Bonner's expenses. In Florida, Porreca said that the assailants had masks on, but he could not do anything about it now without hurting his situation. Porreca reportedly told Bonner, however, that there was a way he could help out: he sees aliens. He claimed that this claim was in some of his hospital records, and he could not understand why it was not brought out at trial. Porreca told Bonner to confirm this with Lynch.

Before this visit in March, 2002, Porreca had never told Bonner that the assailants were wearing masks, or that he saw aliens in the past. The court does not credit Bonner's testimony on these issues.

C. Gene Giangrande's and/or Angelesco's Possible Involvement in the Murder

1. Donald Bonner

Donald Bonner graduated from Medford High School in 1993 where he became acquainted with his Giangrande. Bonner was friendly with Barry. He and Barry were involved together in bookmaking. He owed money to Barry at times. Bonner holds a legitimate job as a letter carrier.

According to Bonner, in early 2000. Giangrande talked to him at dinner in a Boston restaurant about Barry's upcoming trial for the murder. The two men were alone. Giangrande was "stressed out." According to Bonner, Giangrande told him that he (Giangrande) "did it" (the murder). Bonner did not report this conversation to law enforcement authorities. The court does not credit Bonner's testimony on this issue.

However, even if Giangrande was concerned about Barry and said that he, Giangrande, did the murder, that does not exclude the guilt of Barry and Cahill in the murder as well. The evidence at trial gave rise to a reasonable inference that Giangrande could well have been

Oles report

involved in the murder in one way or another.

2. James Sheehan

James Sheehan graduated from Medford High School in 1991 with Giangrande. He also knows Barry. On the Monday or Tuesday after the shooting, Sheehan was playing roller blade hockey in a park in Medford. People were talking about the shooting. He heard that the police were looking for Barry, and three cars. including a silver Chevrolet Blazer and a black Lexus truck or Navigator. A few hours later, Sheehan spoke briefly with Giangrande to tell him that the police were looking for his car. Giangrande said, according to Sheehan, "I got to get out of here. I did it. I got him." No one else was present for this conversation.

Although he knew Barry and Cahill were on trial for the murder, Sheehan never brought this information to the police.

After the trial, according to Sheehan, Giangrande stated to him many times that he did the killing. Giangrande said he shot McCormack because McCormack had slapped him and he could not let that go. Giangrande stated that he went to the driver's side and shot McCormack. No one else was present when Giangrande made these statements to Sheehan.

Another friend of Sheehan's, William Angelesco, told Sheehan in the summer of "2000 or 2001", that he and Giangrande were the shooters. Angelesco told Sheehan that he, Angelesco, had shot McCormack.³¹ No one else was present for this conversation. The court found none of Sheehan's testimony to be credible.

3. Anthony Insogna

Anthony Insogna knows Porreca, Barry, Angelesco and Giangrande. He works with Barry as a truck driver for a company owned by the Saccos of Medford. Barry's mother is related to the Saccos through her sister. In November of 2001, according to Insogna, Porreca called him from Texas. Porreca asked Insogna if Barry was involved in the shooting. Insogna replied that Barry was not involved in the shooting. He told Insogna that the shooters had masks on, and therefore he did not know who they were. He said he wanted to help out Barry, come back home, and get everything "squared away." No one else heard this conversation. Insogna never went to the police with this information.

The court does not credit Insogna's testimony.

Angelesco was summonsed by the defense to the hearing on the new trial motion. From the stand, he claimed his Fifth Amendment privilege.

27

D. Porreca's "Belief in Aliens"

1. Brendan Porreca

Porreca's son. Brendan, testified that Porreca believed in aliens. According to Brendan, Porreca frequently asked Brendan if he had been contacted by aliens, because it "ran in families." The court does not believe any of Brendan Porreca's testimony on this issue.

2. Anne Lynch

Anne Lynch also testified to Porreca's belief in aliens. From as early as 1989 or 1990, according to Lynch, Porreca had a deep interest in aliens. He claimed to have been taken physically by aliens. On one such incident. Porreca claimed the aliens took his sperm. The court does not credit any of Lynch's testimony concerning Porreca's belief in aliens.

IV. RULINGS OF LAW

The defendants have requested a new trial on the following grounds: (1) the Commonwealth's failure to disclose the exculpatory evidence of the Saints Memorial Hospital record, (2) newly discovered evidence concerning (a) Porreca's addiction, inability to identify the killers, and belief in aliens, (b) involvement of Giangrande and/or Agelesco in the murder; and (3) ineffective assistance of counsel.

A. Failure to Disclose Exculpatory Evidence

A prosecutor is obliged to produce exculpatory evidence in his possession "or in the possession of the police who participated in the investigation and presentation of the case". Comm. v. Tucceri, 412 Mass. 401, 407 (1992); see also, Commonwealth v St. Germain, 381 Mass 256, 261, n. 8 (1980)

"To prevail on a claim that the prosecution failed to disclose exculpatory evidence, the defendant must first prove that the evidence was, in fact, exculpatory." Commonwealth v. Healy, 438 Mass. 672, 679 (2003). Exculpatory evidence is "all evidence 'which tends to 'negate the guilt of the accused"... or, stated affirmatively, "supporting the innocence of the defendant." Id., quoting St. Germain, 381 Mass. at 261 n. 6, quoting Commonwealth v. Pisa, 372 Mass. 590, 595. It does not mean evidence which proves that the defendant is innocent. See Healy, 438 Mass. at 679.

It is recognized that evidence of a witness' use of alcohol or drugs at the time of the events at issue, or evidence of a pattern of drug or alcohol addiction at that time, if such use or addiction would "impair the witness's ability to perceive and to remember correctly", is admissible on cross-examination,. Commonwealth v. Carrion, 407 Mass. 263, 273-274 (1990), as it may serve to impeach the witness. As such, it is exculpatory. Commonwealth v. Healy, 438 Mass. 672, 679 (2003). Commonwealth v. Hill, 432 Mass. 704, 715 (2000).

Here, the defense did not know of the visit to Saints Memorial Hospital, and therefore did not make a specific request for records. There was no evidence that the district attorney's office intentionally withheld the information: however, the police did withhold the information. The absence of any police reports memorializing Porreca's hospital treatment suggests that the investigating officers, who were members of the prosecution team, intended to keep the incident secret from defense counsel.

Even in the absence of a specific request, the Commonwealth has a duty to disclose all material and exculpatory evidence in its possession or control. See Tucceri, 412 Mass. at 407. Where the defendant has made no request or a general request for all exculpatory evidence, the test is "whether there is a substantial risk that the jury would have reached a different conclusion if the evidence had been admitted at trial." Id. at 413; Commonwealth v. Brown, 57 Mass. App. Ct. 852, 855 (2003). This test is substantially the same as the Saferian ineffective assistance of counsel standard: "whether [defense counsel's omission] has likely deprived the defendant of an otherwise available, substantial ground of defence." Tucceri, 412 Mass. at 413, quoting Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). "If the undisclosed evidence is cumulative, if it lacks credibility, or if, in an over-all assessment, it does not carry a measure of strength in support of the defendant, the failure to disclose that evidence does not warrant the granting of a new trial. If, however, the undisclosed evidence is more credible than any other evidence on the same factual issue and bears directly on a crucial issue before the jury, such as the credibility of an important prosecution witness, that evidence would have been a real factor in the jury's deliberations, and its presence before the jury might have accomplished something material for the defense." Tucceri, 412 Mass. at 414.

The judge must decide what effect the omission might have had on the jury. Tucceri, at 410: Can the court determine whether, on a full and reasonable assessment of the trial record, the

absent evidence would have played an important role in the jury's deliberations and conclusions, even though it is not certain that the evidence would have produced a verdict of not guilty. *Tucceri*, 412 Mass. at 414. See also, *Commonwealth v. Ellison*, 376 Mass. 1 (1978) and *Commonwealth v. Gallarelli*, 399 Mass. 17, 21 n. 5 (1987).

The Saints Memorial Hospital records certainly possessed irrefutable impeachment value. They were different in kind, and arguably more objective than the testimony of defense witnesses on the topic of Porreca's drug abuse. Armed with this record, defense counsel might have cast serious doubt on Porreca's claim that he was not an active addict at the time of the shooting. The records reveal that Porreca claimed to be suffering symptoms of withdrawal within a day and a half of his testimony before the grand jury. The record would have permitted defense counsel to argue at trial that Porreca continued to use drugs while in the custody of investigators and began suffering symptoms of withdrawal after the drugs ran out. At the very least, Porreca knew when he testified before the grand jury that his supply of drugs had run or was running out. Under the circumstances of this case, the withheld evidence could have been used to challenge Porreca's testimony as unreliable, as his ability to perceive, recall, and recount the events surrounding the shooting were likely impaired by opiate intoxication or withdrawal, both of which could have affected his cognitive functions and perceptions and caused him to search out any available means to gain access to heroin or another opiate.

On the other hand, before and during the trial, the defendants were aware of Porreca's drug use and addiction. In Porreca's grand jury testimony on April 20, 1999, he said he had run out of the Percocets he had been given for gunshot wounds; he had not taken any Percocets on April 20. At Porreca's deposition on January 5, 2000, Porreca admitted to a long history of criminal convictions, including one on which he had been sentenced as recently as February 24, 1998 to serve one year for possession of a Class A substance. With respect to his drug use, Porreca testified that he had been a heroin addict "[o]nly for a couple of years". Porreca testified that he had no heroin on the day of the shooting, Friday, April 16. 1999 but had taken two or three Percocets earlier in the day. He stated that he had been involved in heroin rehabilitation. He denied having a heroin habit at the time he was shot. He said he had been straight "since that night". He stated that by the time he arrived at Cremone's, he was not feeling the effects of the

³² The court takes judicial notice that heroin is a Class A substance under G. L. c. 94C sec. 31.

Percocets. He was in Cremone's about one hour and had five beers before leaving with Kevin McCormack and two girls.

At his deposition, Porreca also stated that Jimmy Miscioscia, Robert Santasky (also known as Bobby Rogers), Lou Pepe, Charlie Guarino, some family members and police visited him at the hospital on Saturday, April 17, 1999. According to Porreca, Pepe and the defendant Barry were "very close". He testified that someone called him at the hospital and offered to bring him heroin: he denied calling anyone and asking them to bring him heroin. He testified that he did not remember, and did not believe, that Pepe brought him heroin in the hospital. He denies that he was withdrawing from drugs in the hospital on April 18 "because actually they were giving me painkillers". Porreca acknowledged being addicted to heroin, "off and on". He said he was an addict on the day he was shot, but he was "not on heroin then".

Furthermore, defense counsel knew through their own investigation that Brian Porreca was withdrawing from opiates after the shooting. A report dated March 1, 2000, disclosed by the defense to the Commonwealth before trial, reveals that the defendants' investigators, the "JEMIS Group," interviewed Bobby Santasky (Rogers) before trial. The investigator reported that, "Bobby Rogers went to the hospital the day after Porreca was shot and stayed there from 9:30 AM – 3:30 p.m.... Porreca was 'Jonesen' (withdrawing from drugs) while in the hospital bed."

In an interview dated January 21, 2000, Charlie Guarino told the JEMIS Group investigators that Guarino was heroin addict with Porreca for three years, from 1996-1999. In the same report, the defendants' investigator notes that "Guarino spoke to Porreca on the Sunday morning after the shooting at the hospital." The investigator noted that during that meeting, "Porreca then asked Charlie for some heroine [sic]. Charlie said that he didn't have any." The defendants were well aware of Porreca's narcotics addiction.

Porreca's testimony before, and during, the trial, combined with the testimony of others at trial, unequivocally portrayed him as a person using and needing Percocets.

During their closing arguments, the defense used Porreca's admissions to argue to the jury that his drug use and addictions impacted his credibility both as to his bias as a witness and as to his ability to perceive events.

The defendants' trial counsel were well aware of Porreca's addiction to opiates, and they

were skillful in bringing the issue to the attention of the jury. Cumulative evidence to the effect that Porreca visited a hospital and complained that he was withdrawing from opiates would not have been significant. Commonwealth v. Tucceri, 412 Mass. 401, 413-414 (1992) (if undisclosed evidence is cumulative, it does not warrant a new trial). This is especially the case given the opinions of Dr. Stuart and the independent evidence adduced at trial which corroborated many of the key points of Porreca's testimony.

Accordingly, the evidence fails to warrant a new trial not only because it is cumulative, but because it does not "carry a measure of strength in support of the defendant." Commonwealth v. Bregoli, 431 Mass. 265, 272 (2000), quoting Commonwealth v. Tucceri, 412 Mass. 401, 414 (1992).

B. Other "Newly Discovered" Evidence

The hearsay upon which the defendants sought to attribute the shooting to Gene Giangrande and William Angelesco was simply not credible. Not surprisingly, most of the witnesses who submitted affidavits attributing these hearsay statements to Porreca, Giangrande. and Angelesco, did not come forward at the evidentiary hearing. These affiants included Anthony M. Insogna, Christian Petrillo, Mark Doherty, Kenneth Nestor, Michael Lawhorne, Joseph Sacco, Maria Sacco, and Michael Barry.

Other than the hospital record, the only substantive non-hearsay evidence presented by the defendants in support of their motion for an evidentiary hearing was the affidavit of Brian Tivnan. Tivnan has known Barry for eighteen years. In his affidavit, Tivnan claimed that he was at Cremone's, and he saw Kevin McCormack's shooter. Tivnan claimed he could see McCormack's face inside the car. Tivnan said the man near McCormack's side of the car did not resemble Anthony Barry in any respect. Tivnan left Cremone's after the shooting, without talking to the police about his observations. Tivnan never offered any of his information to police investigators, despite his long and close friendship with Barry. His affidavit was not credible. He came to the hearing on the motion for a new trial to testify, but when faced with the prospect of the prosecutor actually exploring the veracity of the claims contained in his affidavit, Tivnan asserted his Fifth Amendment rights against self-incrimination.

C. Porreca's Alleged Belief in Aliens

As an initial matter, the defendants have not made a sufficiently convincing showing that Porreca did believe in aliens. In any event, there is not an adequate showing that this claim is newly discovered. There was no substantial risk that the jury would have reached a different conclusion had the alleged newly discovered evidence been admitted at trial. See Commonwealth v. Grace, 397 Mass. 303, 306 (1986); Commonwealth v. Scanlon, 412 Mass. 664, 679-680 (1992).

Although Anne Lynch and Steven Luongo were unknown and unavailable and/or closely associated with Porreca's interests, and therefore unlikely sources for exculpatory evidence at trial, see Commonwealth v. Markham, 10 Mass. App. Ct. 651, 653 (1980), the defense had full access to Brendan Porreca, who presumably had some knowledge of his father's supposed delusional beliefs. Where Brendan was forthcoming in derogatory information about his father, to the extent that he was willing to testify for the men who were on trial for shooting him, it is unlikely, in this court's view, that the issue of aliens would not have arisen in discussions with Brendan if the information were true.

There was absolutely no evidence or proffer that the Commonwealth had information regarding Brian Porreca's alleged in aliens.

D. Ineffective Assistance of Counsel

Late in the proceedings, the defendant asserted claims regarding the effectiveness of counsel. In order to establish ineffective assistance of counsel, a defendant must prove both (1) that "there has been serious incompetency, inefficiency, or inattention of counsel -- behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer," and (2) that defense counsel's performance "has likely deprived the defendant of an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). "In addition, where the claim is that defense counsel committed a tactical error, the defendant must demonstrate that defense counsel's tactical judgment was manifestly unreasonable." Commonwealth v. Alammani, 439 Mass. 605,613 (2003), quoting Commonwealth v. Finstein, 426 Mass. 200, 203 (1997), citing Commonwealth v. Roberts, 423 Mass. 17, 20 (1996)."

There was no credible evidence presented that the experienced defense attorneys who tried the case in front of the experienced Superior Court judge were ineffective with respect to any issue concerning Porreca's credibility.

CONCLUSION

Based upon the foregoing, the defendant Anthony Barry's and Brian Cahill's Joint Motion For New Trial is DENIED.

Elizabeth Butler

Justice of the Superior Court

Elizabeth Butler

DATED: August 20, 2003